

Velikanje Moore & Shore, P.S.

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Of Counsel
John S. Moore

September 5, 2006

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

(Via Electronic Filing)

RE: YILA – Abandonment Exemption
Yakima County, WA, AB 600 (Sub-no 1X)

For filing: PROTESTANT'S MEMORANDUM IN OPPOSITION
TO MOTION TO EXTEND THE NITU NEGOTIATION
AND TO DISMISS NOTICE OF EXEMPTION UNDER
49 CFR 1152 SUBPART F TO ABANDON NACHES
LINE FROM MILEPOST 2.97 TO MILEPOST 14.26

DECLARATION OF BOB KERSHAW IN SUPPORT OF
PROTESTANT'S MEMORANDUM IN OPPOSITION TO
MOTION TO EXTEND THE NITU NEGOTIATION AND
TO DISMISS NOTICE OF EXEMPTION UNDER 49 CFR
1152 SUBPART F TO ABANDON NACHES LINE FROM
MILEPOST 2.97 TO MILEPOST 14.26

Dear Mr. Williams:

Enclosed please find Protestant's Memorandum In Opposition and the Declaration of Bob Kershaw in response to Yakima County's motion for extension of the NITU.

Very truly yours,

VELIKANJE, MOORE & SHORE, P.S.



Kevan T. Montoya

KTM:dg

cc: Charles H. Montange
Paul Edmondson, Esq.
Raymond L. Paoella
Lawrence E. Martin, Esq.
Terry Austin, Esq.
(w/enclosures)

BEFORE THE SURFACE TRANSPORTATION BOARD

Yakima Interurban Lines Association,)
-- Abandonment Exemption – in) AB 600 (sub-no. 1X)
-- Yakima County, WA)

**PROTESTANT’S MEMORANDUM IN OPPOSITION TO MOTION TO
EXTEND THE NITU NEGOTIATION AND TO DISMISS NOTICE OF
EXEMPTION UNDER 49 CFR 1152 SUBPART F TO ABANDON NACHES LINE
FROM MILEPOST 2.97 TO MILEPOST 14.26**

I. PROTESTANT’S NAME, ADDRESS AND BUSINESS

Kershaw Sunnyside Ranches, c/o Bob Kershaw, President, 151 Low Road, Yakima,
WA 98908.

II. STATEMENT DESCRIBING PROTESTANT’S INTEREST

Kershaw Sunnyside Ranches, Inc. (Kershaw Sunnyside Ranches) claims ownership of the land over which part of the railroad right-of-way at issue in this matter travels. (Declaration of Robert Kershaw In Opposition To Motion To Extend the NITU Negotiation . . . , dated September 5, 2006). Kershaw Sunnyside Ranches has a recognized reversionary interest in the property on which the line is located. *See Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Association*, 156 Wn.2d 253, 272-273, 126 P.3d 16 (2006). Additionally, the Surface Transportation Board (STB) denied the application of Kershaw Sunnyside Ranches for adverse abandonment of approximately one mile on November 19, 2004. *Yakima Interurban Lines Association – Adverse Abandonment – in Yakima County, Washington*, (AB-600, 34751, EB reconsid. denied, September 15, 2005, AB 600, 35592, MEMORANDUM IN OPPOSITION TO MOTION TO EXTEND THE NITU NEGOTIATION AND TO DISMISS NOTICE OF EXEMPTION UNDER 49 CFR 1152 SUBPART F TO ABANDON NACHES LINE FROM MILEPOST 2.97 TO MILEPOST 14.26 - 1

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EB, Petition for review filed November 8, 2005, sub.nom., *Kershaw Sunnyside Ranches v. U.S.A.*, 9th Cir. 05-76364. The Decision stated that the STB's "finding [was] without prejudice to Kershaw's seeking to reopen or file a new abandonment application, should the proposed rehabilitation and restoration not occur within a reasonable period of time. *Id.* On reconsideration, the STB ruled in *Yakima Interurban Lines Association – Adverse Abandonment – in Yakima County, WA* AB-600, 35592, EB (2005), "[o]ur PC&N Finding was not (and is not) intended to be a shield to hold this line open indefinitely without a resumption of rail service. A significant delay and a demonstrated lack of progress could be evidence of changed circumstances warranting a grant of adverse abandonment authority." (p.4).

III. SPECIFIC REASON WHY PROTESTANT OPPOSES THE APPLICATION

A. Abandonment of the Yakima Interurban Lines (YILA) line is not subject to STB jurisdiction.

The abandonment is not subject to STB jurisdiction. Under 49 U.S.C. § 10501(a)(2)(A), the STB has jurisdiction over transportation by rail carriers between a place in a State and a place in the same or another State as part of the interstate rail network. *Fun Trains, Inc.* – STB Finance Docket No. 33472 (1998); *Napa Valley Wine Train, Inc.*, 7.I.C.C. 954 (1991).

YILA is a noncarrier that filed a verified Notice of Exemption to acquire the line at issue. (Declaration of Robert C. Kershaw In Opposition To Motion To Extend the NITU Negotiation Period . . ., dated September 5, 2006, exhibit 6). The Railroad Retirement Board issued a decision that YILA operates "an excursion railroad which is not subject to STB jurisdiction under 49 U.S.C. § 10501(a)(2)(A). (Declaration of Robert Kershaw, dated September 5, 2006).

MEMORANDUM IN OPPOSITION TO MOTION TO EXTEND
THE NITU NEGOTIATION AND TO DISMISS
NOTICE OF EXEMPTION UNDER 49 CFR 1152 SUBPART F
TO ABANDON NACHES LINE FROM MILEPOST 2.97
TO MILEPOST 14.26 - 2

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This matter is not within the STB's jurisdiction. YILA operates an excursion railroad. It currently has no cars that are operating on the line at issue. Its excursion points are from Yakima to Selah, Washington. It has not traveled on the line at issue in this case at any time.

B. If this matter is within STB jurisdiction, the Board should deny the request for an additional 180 days for negotiation of a Notice of Interim Trial Use (NITU).

The STB should not grant additional time for YILA to negotiate issues of a NITU. As stated in *Jost v. Surface Transportation Board*:

Under the NITU, the authorization to abandon the line is stayed for a set period of time and the railroad is instead authorized to transfer the line for railbanking and interim trail use. If the parties' negotiations are successful then the line is conveyed for interim trail use and possible future rail service. If the negotiations are unsuccessful, then the railroad's exemption takes effect, and the line may be abandoned. **Whether the negotiations of interim trial use are successful or not, the Board need not reopen the proceedings once the NITU is issued.**

194 F.3d 79, 82 (D.C. Cir. 1999) (emphasis added).

A "*defacto* abandonment may occur when a line was no longer linked to and part of the interstate rail system." *Jost*, 194 F.3d at 87 (citing *RLTD Ry. Corp. v. STB*, 166 F.3d 808, 812 (6th Cir. 1999)).

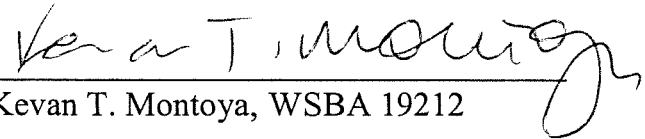
The rail line in this case is no longer connected to any interstate rail system. The STD should abandon the line and not allow any additional time for an NITU or other action because a defacto abandonment has occurred.

MEMORANDUM IN OPPOSITION TO MOTION TO EXTEND
THE NITU NEGOTIATION AND TO DISMISS
NOTICE OF EXEMPTION UNDER 49 CFR 1152 SUBPART F
TO ABANDON NACHES LINE FROM MILEPOST 2.97
TO MILEPOST 14.26 - 3

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Respectfully submitted this 5th day of September, 2006.

VELIKANJE, MOORE & SHORE, P.S.
Attorneys for Protestant
Kershaw Sunnyside Ranches, Inc.


Kevan T. Montoya, WSBA 19212

CERTIFICATE OF SERVICE

By my signature below, I certify service on September 5, 2006, by U.S. Mail, postage pre-paid first class, of the foregoing upon the following counsel of record:

Charles Montange
Attorney at Law
426 NW 162nd Street
Seattle, WA 98177

Paul Edmondson, Esq. (YILA)
313 North Third Street
Yakima, WA 98901

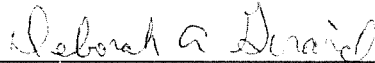
Raymond L. Paoella
City Attorney
City of Yakima
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Yakima, WA 98901-2830

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MEMORANDUM IN OPPOSITION TO MOTION TO EXTEND
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Chief Civil Deputy Pros. Atty.
Yakima County Courthouse
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Deborah A. Girard

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MEMORANDUM IN OPPOSITION TO MOTION TO EXTEND
THE NITU NEGOTIATION AND TO DISMISS
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BEFORE THE SURFACE TRANSPORTATION BOARD

Yakima Interurban Lines Association,)
-- Abandonment Exemption – in) AB 600 (sub-no. 1X)
-- Yakima County, WA)

**DECLARATION OF ROBERT C. KERSHAW IN SUPPORT OF PROTESTANT'S
MEMORANDUM IN OPPOSITION TO MOTION TO EXTEND THE NITU
NEGOTIATION AND TO DISMISS NOTICE OF EXEMPTION UNDER 49 CFR
1152 SUBPART F TO ABANDON NACHES LINE FROM MILEPOST 2.97 TO
MILEPOST 14.26**

1. I am the president of Kershaw Sunnyside Ranches, Inc. (Kershaw Sunnyside Ranches) and Kershaw Fruit and Cold Storage Co., Inc. (Kershaw Fruit) (collectively referred to as the "Kershaw Companies"). I make this declaration based on knowledge of facts to which I am competent to testify and would testify at trial. The Kershaw Companies claim ownership of the land over which the railroad right-of-way in this case travels.

2. Kershaw Sunnyside Ranches is a substantial, vertically integrated fruit company. It grows, packs and markets cherries, apples and pears. The Kershaw Companies are expanding and consistently adding employees. We are at the point where we are running out of space and need to expand. The Kershaw Companies' principal offices and packing facilities are located at 151 Low Road in Glee, Washington, between Yakima and Naches, Washington. At the office at 151 Low Road, Kershaw Sunnyside Ranches employs approximately 300 people.

3. Kershaw Sunnyside Ranches has been in litigation in Washington State with Level 3 Communications LLC (Level 3) and the Yakima Interurban Lines Association (YILA) since 2000 regarding the illegal installation and existence of a fiber optic cable that Level 3 and its agents installed under the railroad in this case. A true and correct copy of Kershaw Sunnyside Ranches' First Amended Complaint is attached as **exhibit 1**. A true and correct copy of my Declaration, filed February 2, 2001, filed in the Superior Court lawsuit in Washington State is attached as **exhibit 2**.

4. I am personally familiar with the condition of the rail line at issue in this case from the City of Yakima at Fruitvale Blvd., where the line begins, to Kershaw Sunnyside Ranches'.

DECLARATION OF ROBERT C. KERSHAW
IN OPPOSITION TO MOTION TO
EXTEND THE NITU NEGOTIATION PERIOD - 1

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property, approximately halfway to Glead. At places from the beginning of the line at Fruitvale Avenue in the City of Yakima, west to the Kershaw Sunnyside Ranches property, the line is covered with dirt and buried. At other places the track and rails are missing. The track is not connected to another rail line.

5. My business offices are less than approximately 100 feet from the railroad track. I have not seen or heard any rail traffic on the rail line since 1996. Kershaw Sunnyside Ranches filed an adverse abandonment application in which we tried to have this line abandoned. (A true and correct copy of the Application is attached as **exhibit 3**). The Surface Transportation Board (STB) denied our request for an adverse abandonment and stated that we could refile in the future. Since that decision on November 19, 2004, the condition of the track has deteriorated. (A true and correct copy of the Decision is attached as **exhibit 4**). Part of the opposition to Kershaw Sunnyside Ranches' adverse abandonment case was the result of a lumber mill in Naches, at the west end of the line, potentially needing freight rail service. Since we filed our petition, the lumber mill has gone out of business and is no longer operating. At the eastern end of the track at issue in this case is a sign that indicates that the track at issue is "out of service." In Kershaw Sunnyside Ranches' proceeding, the people who are now proceeding to abandon this track claimed that the track was not abandoned. They have since changed their position.

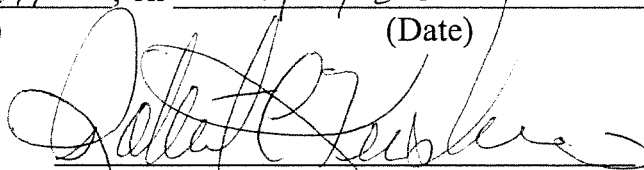
6. I grew up in Yakima County. I am familiar with YILA's operation in the county. In the past, YILA operated trolleys that travel from Yakima to Selah, Washington. According to information from Kershaw Sunnyside Ranches lawsuit against them, they still only run trolleys. The trolleys do not travel on the track at issue in this case. I have never seen the trolleys on the track at issue in this case. According to a Railroad Retirement Board decision, YILA is an excursion railroad. (A true and correct copy of the decision is attached as **exhibit 5**. It can be found at www.rrb.gov/blaw/bcd/ndt_covered_employer.asp). YILA filed an exemption at the time it received the property at issue in this case. (A true and correct copy of the exemption is attached as **exhibit 6**).

7. YILA is successor to Burlington Northern and Santa Fe Railway Company and its related entities. The original right-of-way in this case was granted to the railroads by my grandfather. (A true and correct copy of the October 5, 1905 deed from E.A. Kershaw to North Yakima & Valley Railway Co. is in exhibit 2). The original right-of-way was conditioned on the railroad maintaining the crossings. None of that has occurred since 1996. This action is thwarting the implementation of the reversionary rights that I claim Kershaw Sunnyside Ranches has in the

property at issue in this case. I would like to finally have someone put an end to this matter after eleven years of nonuse of this track.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed at Yakima, WA, on 9/5/06.
(City and State) (Date)


ROBERT C. KERSHAW

CERTIFICATE OF SERVICE

By my signature below, I certify service on September 5, 2006, by U.S. Mail, postage pre-paid first class, of the foregoing upon the following counsel of record:


Charles Montange
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426 NW 162nd Street
Seattle, WA 98177

Paul Edmondson, Esq. (YILA)
313 North Third Street
Yakima, WA 98901

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Deborah A. Girard

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EXHIBIT 1

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9 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
10 IN AND FOR THE COUNTY OF YAKIMA
11

12 KERSHAW SUNNYSIDE RANCHES, INC, a)
13 Washington Corporation)

14)
15 Plaintiffs,)

16 v.)
17)

18 YAKIMA INTERURBAN LINES)
19 ASSOCIATION, a Washington Nonprofit)
20 Corporation, LEVEL 3 COMMUNICATIONS,)
21 LLC, a Delaware Limited Liability Company,)
22 BNSF ACQUISITION, INC., a Delaware)
23 Corporation, THE BURLINGTON)
24 NORTHERN AND SANTA FE RAILWAY)
25 COMPANY, a Delaware Company, and)
26 STATE OF WASHINGTON)

27 Defendants.)
28)

No. 00-2-01550-9

FIRST AMENDED
COMPLAINT
COMPLAINT FOR
QUIET TITLE,
DAMAGES AND
PERMANENT
INJUNCTION

29 Kershaw Sunnyside Ranches, Inc. alleges:

30 1.0 Kershaw Sunnyside Ranches, Inc. is a Washington Corporation that resides
31 and does business in Yakima County Washington. Kershaw Sunnyside Ranches is
32 the Real Estate Contract Vendee of the property legally described as follows:
33
34

35 First Amended Complaint for Quiet Title
KTM/11070ce

1

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1 That certain strip of land seventy five feet wide across the East ½ of the
2 Southwest ¼ and the Southwest ¼ of the Southeast ¼ of Section 24,
3 Township 14 North Range 17 E.W.M. and also the Northwest ¼ of the
4 Northeast ¼ of Section 25 Township 14 North Range 17 E.W.M., being a
5 strip of land 75 feet in width, 37 ½ feet on each side of the center line of
6 the North Yakima Valley Railway Company as located and staked about
7 across said premises, on October 4, 1905, together with any and all
8 additional widths that may be necessary to catch the slopes of the cuts and
9 fills of the roadbed of said railroad; also across the Southwest ¼ of the
10 Northwest ¼ of said Section 24.

11 Situated in Yakima County, Washington. (Hereinafter referred to as "the
12 property", or "the property described in paragraph 1.0").

13 2.0 Ronald Kershaw and Betty A. Kershaw are the vendors of the property
14 described in paragraph 1.0. They have assigned the rights to this action to
15 Kershaw Sunnyside Ranches. Ronald and Betty Kershaw received the property
16 described in paragraph 1.0 from Edward A. Kershaw, Ronald's father. Edward A.
17 Kershaw received the property described in paragraph 1.0 from his father in fee
18 simple, without a railroad right-of-way.
19
20
21

22 3.0 The Yakima Interurban Lines Association is a nonprofit Washington
23 Corporation that did business in Yakima, Washington and has a record interest in
24 the property. Level 3 Communications, LLC, is a Delaware Limited Liability
25 Company that does business in the state of Washington. BNSF Acquisition, Inc.,
26 is a Delaware Corporation that does business in the state of Washington and has a
27 record interest in the property. The Burlington Northern and Santa Fe Railway
28 Company is a Delaware Corporation that does business in the state of Washington
29 and has a record interest in the property. The state of Washington may have an
30 interest in the property described in paragraph 1.0.
31
32
33
34

1 4.0 On October 3, 1905, Edward A. Kershaw signed a contract for deed
2 granting the North Coast Railway the northern part of the property described in
3 1.0, "to be used as a right-of-way for, and for the construction of, its Railroad".
4 The contract was for an eighty feet wide strip. Either BNSF Acquisition or The
5 Burlington Northern Santa Fe Railway Company is the North Coast Railway's
6 successor in interest.
7

8
9 5.0 October 5, 1905, a right-of-way deed was recorded that transferred to the
10 North Yakima & Valley Railway Company the right-of-way for the southern part
11 of the real property described in paragraph 1.0 from Edward A. Kershaw. The
12 deed granted the Railway Company:
13

14 a strip of land seventy five feet wide, in, along, over and through [the
15 land described in paragraph 1] to be used by said party of the second
16 part as a right of way for a railway forever, together with the
17 perpetual right to construct, maintain and operate a railway or
18 railways over and across the same.

19 The deed was binding on successors and assigns "so long as a railway may be
20 maintained by it or them over and across said premises." Either BNSF Acquisition
21 or The Burlington Northern Santa Fe Railway Company is the North Coast
22 Railway's successor in interest.
23

24
25 6.0 On February 18, 1999, the Burlington Northern and Santa Fe Railway
26 Company signed a quit claim deed that granted the following property to the
27 Yakima Interurban Lines:
28

29
30 Grantor's rights, title and interest, if any, in real estate and
31 improvements constituting Grantor's rail corridor between milepost
32 2.97, near Fruitvale, Washington, and the western end of this rail
33 line corridor at or near Milepost 14.26, in or near Naches,
34

1 Washington, which real estate and improvements are situated in
2 Yakima County, Washington

3 The Deed was recorded on March 21, 2000. It excepted and reserved to the
4 Grantor:

5 all of the coal, oil, gas, casing-head gas and all ores and minerals of
6 every kind and nature, underlying the surface of the Premises,
7 together with access easements across any portion of the Premises to
8 explore . . remove and market, any and all such products in any
9 manner

10
11 The Deed also reserved to the Grantor the exclusive right to a "permanent
12 easement for construction, reconstruction, maintenance, use and/or operation of
13 one or more longitudinal pipelines for . . . fiber optic communication lines,"

14
15 The deed covered the land described in paragraph 1.0. Contrary to the Deed,
16 Kershaw Ranches retains the subsurface estate occupied by the fiberoptic line.

17
18 7.0 On February 18, 1999, BNSF Acquisition signed a quit claim deed that
19 granted the following property to the Yakima Interurban Lines:
20

21
22 Grantor's rights, title and interest, if any in real estate and
23 improvements constituting Grantor's rail corridor between Milepost
24 2.97, near Fruitvale, Washington, and the western end of this rail
25 line corridor at or near Milepost 14.26, . . . situated in Yakima
26 County, Washington

27 The Deed was recorded on March 21, 2000. It excepted and reserved to the
28 Grantor:

29
30 all of the coal oil, gas, casing-head gas and all ores and minerals of
31 every kind and nature, underlying the surface of the Premises,
32 together with access easements across any kind and nature,
33
34

1 underlying the surface of the Premises, together with access easements
2 across any portion of the Premises to explore . . . remove and market, and
3 all such products in any manner . . .

4 The Deed also reserved to the Grantor the exclusive right to a "permanent
5 easement for construction, reconstruction, maintenance, use and/or operation of
6 one or more longitudinal pipelines for . . . fiber optic communication lines, . . ."
7 The deed covered the land described in paragraph 1.0. Contrary to the Deed,
8 Kershaw Ranches retains the subsurface estate occupied by the fiberoptic line.
9

10
11 8.0 The Yakima Interurban Lines recently operated a railway in Yakima
12 County. The Yakima Interurban Lines has attempted to repair or improve the lines
13 at issue in this case with the assistance of the State of Washington. The State of
14 Washington has a lien on the property as recorded in a Memorandum of
15 Agreement, filed February 28, 2000. Yakima Interurban Lines and its
16 predecessors abandoned the railway that was reserved in the October 3, 1905,
17 contract for deed and the October 5, 1905, right-of-way deed. Yakima Interurban
18 Lines is currently not operating a railway in the right-of-way and has no ability to
19 do so.
20
21
22

23
24 9.0 Yakima Interurban Lines' employees and/or agents intentionally damaged
25 Kershaw Sunnyside Ranches' irrigation equipment on Kershaw Sunnyside
26 Ranches' real property.
27

28
29 10.0 Level 3 is a Washington telecommunications company operating under
30 authority of the Washington Utilities and Transportation Commission.
31
32
33
34

Quiet Title

11.0 Kershaw Sunnyside Ranches is the owner in fee simple of the land occupied by the fiberoptic cable. It has superior legal title to the title of all of the defendants. Level 3 Communications has no right to the subsurface estate occupied by its fiberoptic cable. Accordingly, Kershaw Sunnyside Ranches requests that the court grant an order quieting title in it for the property described in paragraph 1.0.

12.0 Yakima Interurban Lines and/or its predecessors in interest abandoned the right-of-way for a railway that Robert A. Kershaw granted to the North Yakima & Valley Railway Company on October 5, 1905, and that was contracted to North Coast Railway on October 2, 1905. Kershaw Sunnyside Ranches holds a revisionary interest to that land. Accordingly, it requests an order quieting title in the land covered by the right-of-way granted in the deed and the contract.

13.0 Level 3 Communications is a utility operating under the authority of laws of the state of Washington.

Trespass

14.0 Level 3 Communications' agents and/or employees intentionally entered and installed fiberoptic cables on the Kershaw Sunnyside Ranches Property without permission or right. This was within the scope of their employment for Level 3 Communications. As a result of the trespass, Kershaw Sunnyside Ranches has suffered damages for which Level 3 is liable.

1 14.1 Yakima Interurban Lines' agents and/or employees intentionally entered
2 Kershaw Sunnyside Ranches property without permission or right to work on
3 railway track. This was within the scope of their employment for Yakima
4 Interurban Lines. As a result of the trespass, Kershaw Sunnyside Ranches has
5 suffered damages for which Yakima Interurban Lines is liable.
6

7 8 **Injunction** 9

10 15.0 Level 3 Communications's fiberoptic line is continuing to occupy Kershaw
11 Sunnyside Ranches's real property. Kershaw Sunnyside Ranches requests that the
12 court enter an order pursuant to RCW 7.40.020 that restrains the future entry or
13 use of the land, regardless of the presence of the cable.
14
15

16
17 15.1 Kershaw Sunnyside Ranches seeks a permanent injunction that prevents
18 the continued occupancy of its land by the fiberoptic cable that Level 3
19 Communications or any agents or employees of Yakima Interurban Lines laid and
20 preventing them from entering Kershaw Sunnyside Ranches' real property.
21
22

23 **Conversion** 24

25
26 16.0 The Yakima Interurban Lines' Agents and/or employees who have repaired
27 the railway track for Yakima Interurban Lines ran over and damaged irrigation
28 equipment that Kershaw Sunnyside Ranches owned. Kershaw Sunnyside Ranches
29 seeks damages for the destroyed equipment in an amount to be proven at the time
30 of trial.
31
32
33
34

RCW 4.24.630

17.0 The Yakima Interurban Lines' agents and/or employees entered Kershaw Sunnyside Ranches' real property and intentionally damaged their irrigation equipment. As a result, Yakima Interurban Lines is liable for treble damages, costs and fees under RCW 4.24.630 for damages to the property.

42 U.S.C. § 1983

18.0 Level 3 placed its fiber optic cable across Kershaw Sunnyside Ranches' land without starting a condemnation proceeding. It also placed the cable in an onerous location without giving Kershaw Sunnyside Ranches an opportunity for a hearing on the issue.

19.0 Level 3 Communications was operating under color of state law when it installed the fiber optic cable across the Kershaw Sunnyside Ranches' property. By installing the fiber optic cable it violated Kershaw Sunnyside Ranches rights under the 5th and 14th Amendments to the Constitution of the United States by taking the Kershaw Sunnyside Property without just compensation. As a result, Kershaw Sunnyside Ranches has suffered damages.

20.0 Level 3 Communications' action in installing the fiber optic cable was an intentional or reckless disregard of Kershaw Sunnyside Ranches' civil rights as granted by the United States Constitution. As a result, the court should award punitive damages.

Violation of RCW 80.04.440

21.0 Level 3 Communications is required to follow RCW 80.36.005- .901 because it is a telecommunications company. Additionally, Level 3 Communications is a public service company under RCW 80.04.010.

22.0 Level 3 was required by RCW 80.36.010 and Article 1 § 16 of the Washington State Constitution to acquire any Kershaw Sunnyside Ranches land that it needed by eminent domain. RCW 80.36.020 also limited Level 3's rights to acquisition to "so much land as may be actually necessary for its telecommunications line" Level 3 violated these provisions by locating its cable across the Kershaw Sunnyside Ranches property without instituting an eminent domain proceeding and by not following the procedure in RCW 8.20.010-.180. Additionally, it violated these provisions, RCW 8.20.010 and RCW 8.25.010-.280. by placing the cable through the middle of the Kershaw Sunnyside Ranches facility. As a result, Level 3 Communications is liable for damages, including attorney's fees and costs under RCW 80.04.440 by failing to follow RCW 80.36.010, RCW 80.36.020 and Article 1 § 16 of the Washington State Constitution.

WHEREFORE, Kershaw Sunnyside Ranches prays for relief as follow:

1. For an Order Quieting Title in favor of Kershaw Sunnyside Ranches as to the land described in paragraph 1, as allowed by RCW 7.28.010, and allowing the removal of the fiberoptic cable;

- 1 2. For damages against Level 3 Communications and Yakima Interurban Lines
2 for trespass and against Yakima Interurban Lines for conversion;
3
4 3. For an Order granting a permanent injunction against the continued use or
5 occupation of the Kershaw Sunnyside Ranches property by Level 3
6 Communications and by Yakima Interurban Lines;
7
8
9 4. For compensatory damages and punitive damages for violation of 42 U.S.C. §
10 1983;
11
12
13 5. For attorney's fees and costs under 42 U.S.C. § 1988(b) and (c);
14
15
16 6. For damages, including costs and attorney's fees under RCW 80.04.440;
17
18 7. For costs and attorney's fees against the Defendants as allowed by
19 Washington Law, including costs and fees against Yakima Interurban Lines for
20 violation of RCW 4.24.630;
21
22
23 8. For such other and further relief as the court may deem just and equitable.
24

25
26 DATED this _____ day of September, 2001.

27 VELIKANJE, MOORE & SHORE, P.S.
28 Attorneys for Plaintiffs
29

30 By: _____
31 Kevan T. Montoya
32 WSBA No. 19212
33
34

EXHIBIT 2

CERTIFICATE OF TRANSMITTAL

I hereby certify that we sent a copy of this to the attorneys for the plaintiffs/defendants by mail, postage prepaid, or by ~~attorneys messenger service~~. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Yakima, WA 2-2-01

Date

Cinda Erwin

FILED
FEB 2 2001

KIM M. EATON, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

KERSHAW SUNNYSIDE RANCHES, INC, a
Washington Corporation

Plaintiffs,

v.

YAKIMA INTERURBAN LINES
ASSOCIATION, a Washington Nonprofit
Corporation, LEVEL 3 COMMUNICATIONS,
LLC, a Delaware Limited Liability Company,
BNSF ACQUISITION, INC., a Delaware
Corporation, THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY, a
Delaware Company, and STATE OF
WASHINGTON

Defendants.

No. 00-2-01550-9

DECLARATION OF
ROBERT KERSHAW
IN SUPPORT OF
MOTION FOR PARTIAL
SUMMARY JUDGMENT

1.0 I am the president of Kershaw Sunnyside Ranches, Inc. (Kershaw Sunnyside Ranches).
I make this declaration upon knowledge of facts to which I am competent to testify and would
testify at trial.

2.0 Kershaw Sunnyside Ranches is currently the purchaser by real estate contract of the
land legally described as exhibit A to the real estate contract, dated November 25, 1986, and
filed under Yakima County Auditor number 1198 1831. (A complete and accurate copy of

Declaration of Robert Kershaw
KTM/7746ce

1

Velikanje, Moore & Shore, P.S.
attorneys at law
405 East Lincoln Ave.
P.O. Box 22550
Yakima, WA 98907

1 the real estate contract is attached as exhibit A, and hereinafter, referred to as "the property at
2 issue").

3
4 3.0 I am 62 years old. Ronald Kershaw, my father, owned the property that is at issue from
5 approximately 1960 to 1986. On January 20, 1960, Ora Kershaw, my grandmother, quit
6 claimed her interest to my father. Since 1938, I have lived next to the property at issue or
7 worked at an office on it. Kershaw Sunnyside Ranches is operating as the assignee for
8 Ronald and Betty Kershaw in this case of their vendors' interest under the real estate contract
9 that is attached as exhibit A. Before my mother and father owned it, Edward A. Kershaw and
10 Ora A. Kershaw, my paternal grandparents, owned the property.
11
12

13
14 4.0 Kershaw Sunnyside Ranches is a continuation of the business that my great-grandfather
15 Robert Kershaw started in approximately 1887. Robert received the property from James
16 Gleed. (A copy of the Warranty Deed is attached as exhibit B.). The warranty deed does not
17 have any right-of way reserved for the railroad. Mr. Gleed received the property from Patrick
18 Carey. A copy of the Warranty Deed from Mr. Carey to Mr. Gleed is attached as exhibit C.
19 Ron Kershaw, my father, ran the business until approximately 1970. I have run Kershaw
20 Sunnyside Ranches since 1963. My father and I incorporated it that year. My brother
21 Edward and I consolidated the operations of my father's and my business with Edward's and
22 my father's other business, Kershaw Fruit and Cold Storage, in 1970. Since then, we have
23 run Kershaw Sunnyside Ranches.
24
25

26
27 5.0 In my capacity as president of Kershaw Sunnyside Ranches, I have overseen all aspects
28 of its operations. I maintain the real property documents for Kershaw Sunnyside Ranches in
29 a file at my office. I am the custodian for the documents. I received the documents from my
30 father related to ownership of the property at issue.
31
32
33
34

1 6.0 Attached as exhibit D is a copy of a Contract for Deed given by Edward A. Kershaw
2 and Ora Kershaw to the North Coast Railway, dated October 2, 1905. Attached as exhibit E
3 is a copy of a right-of-way deed from E.A. (Edward) and Ora Kershaw, to the North Yakima
4 Railway Company, dated October 4, 1905. The railroad subsequently located a railroad in
5 the right of way. (A copy of a map showing the location of the railroad is attached as exhibit
6 F).

7
8
9 7.0 I have thoroughly searched the records of Kershaw Sunnyside Ranches and the records
10 from my parents and grandparents related to the property. I have not found any deeds or
11 other documents in favor of any railroad or other company granting rights to the property at
12 issue, except as indicated in exhibits D and E.
13

14
15 8.0 I saw the location in which the fiberoptic cable was laid on Kershaw Sunnyside's
16 property. The cable was laid at a depth of 48 inches. It was placed within 30 feet of the
17 center of the railroad right of way on the north of the railroad line on part of our property and
18 on the south of the rail line at the east end of our property.
19

20 I declare under penalty of perjury under the laws of the state of Washington that the
21 foregoing is true and correct.
22

23 Signed at Yakima, WA, on 11/3/01.
24 (City and State) (Date)

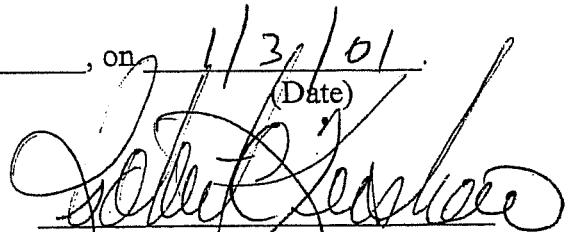
25
26 
27 Robert Kershaw
28
29
30
31
32
33
34

EXHIBIT A

2784493

31100
KW

REAL ESTATE CONTRACT

Return to: William, Sh...
425 E. 8th St. - 11735
Yakima, WA 98701

Dated: November 25, 1986

2784493

1. Seller, RONALD KERSHAW and BETTY A. KERSHAW, husband and wife,
agrees to sell to Purchaser, KERSHAW SUNNYSIDE RANCHES, INC., a Washington corporation
and Purchaser agrees to buy from Seller, the following property in Yakima
County, Washington

SEE EXHIBIT A

COUNTY EXCISE TAX
DATE 12-18-86
PAID \$ 2,051.77
REC. NO. 222620
BY [Signature]
GAIL A. GRAY, Yakima County Treasurer

2. PURCHASE PRICE - The purchase price is \$ 155,417.00
of which \$ 2051.77 has been paid, receipt being acknowledged.
Purchaser agrees to pay the balance of the purchase price, together with interest on deferred balances at the rate of
ten % per annum from November 1, 1986 as follows:

At the rate of \$1,500.00, or more, per month (including interest), commencing on
December 1, 1986, and thereafter, a like amount, or more, on or before the same
date of each succeeding calendar month until principal and interest are paid in
full. From each monthly installment accrued interest shall first be deducted and
the remainder shall be applied to principal.



All payments shall be made at the place designated by the Seller.

OFFICIAL RECORDS

901 1108 1831

638

November 1, 1986

3. **POSSESSION** - Purchaser shall be entitled to possession of the property on
4. **PERSONAL PROPERTY** - Title to personal property described above shall remain in Seller until Purchaser has fully performed this contract, and Purchaser hereby grants to Seller a security interest in all of said property, all insurance and other proceeds relating thereto and all property subsequently acquired by Purchaser in substitution thereof as security for the performance of Purchaser's obligations herein. Purchaser agrees to execute and deliver to Seller such further documents, UCC Financing Statements and Statements of Continuation which Seller may request to further evidence or perfect Seller's security interests in said property. Purchaser's rights to the property shall be subject to all applicable terms and conditions of this contract. Personal property shall be maintained in good condition and not disposed of by Purchaser without written consent of Seller. All personal property shall remain on the real property described above, provided temporary removal shall be permitted for making of repairs under where the intended use of the property, such as vehicles, necessitates temporary removal.
5. **ASSESSMENTS AND TAXES** - Purchaser shall pay, before delinquency, all taxes, assessments, water rents or water assessments, utility charges, and operation or construction charges not now delinquent, and all levied or assessed against the property and hereafter falling due, except that real estate taxes for year ... 1986 ... and personal property taxes for year ... 1986 ... shall be prorated. In the event any taxes, assessments, rents or charges to be paid by Purchaser are paid by Seller, Purchaser shall promptly reimburse Seller. Upon failure of Purchaser to pay any taxes, assessments, rents or charges to be paid by Purchaser, Seller may, at their option, declare a forfeiture of this contract or pay and discharge any such tax, assessment, rent or charge, and any amount so paid shall be added to and be secured in the same manner as the unpaid purchase price, bear interest at the rate of 1.5% per month, and be due immediately.
6. **IMPROVEMENTS** - All improvements now or hereafter made to or placed on the property shall become a part thereof and shall not be removed.
7. **LIENS, CHARGES AND ENCUMBRANCES** - Purchaser shall pay, before a delinquency of any debts secured thereby, all liens, charges or encumbrances hereafter lawfully imposed on the property, assumed by Purchaser in this contract or subject to which this purchase and sale is made; and shall not allow any part of the property to become subject to liens, charges or encumbrances having priority over the rights of Seller in the property. Notwithstanding anything to the contrary provided above in this paragraph 7, Purchaser shall not be responsible for any liens or encumbrances for payment of the obligations secured thereby imposed upon said property subsequent to the date of this contract by or through Seller unless such liens, encumbrances or obligations are expressly assumed by Purchaser.
8. **EXISTING MORTGAGE OR SECURED OBLIGATION** - Unless otherwise provided herein, if there is a mortgage or other secured obligation on the property, Seller shall keep the same current at all times, satisfy the same of record upon or prior to satisfaction of this contract, and indemnify, defend and hold Purchaser harmless with regard thereto. If Seller fails to make any payment thereon, Purchaser may do so and, at Purchaser's election (a) receive credit therefor against the next due payments hereon, or (b) demand reimbursement from Seller, together with interest thereon at 1.5% per month, and institute suit to collect the same.
9. **CONDITION OF PREMISES, TREES AND CROPS** - The condition of the premises, trees and crops at the time of closing of this contract shall be as shown on the attached map and plat. Purchaser reserves the right to remove any and all orchard trees and other improvements now situated on the real property which is the subject matter of this Real Estate Contract.
10. **USE OF PROPERTY** - Purchaser shall not make nor allow any unlawful use of the property.
11. **INSURANCE** - Purchaser shall obtain and maintain fire and theft insurance on the property in the amount of the purchase price, and shall pay the cost of such insurance. Seller shall not be responsible for the cost of such insurance.
12. **CONDEMNATION** - If the property or any part shall be taken and condemned, such taking shall not be a ground for rescission of this contract. The award made for the taking shall be deemed to be the property of Purchaser, but shall be paid to Seller to apply upon the purchase price, not exceeding any amounts then unpaid hereunder.
13. **ASSIGNMENT OR TRANSFER** - The Purchaser shall not assign this contract without the written consent of the Seller. The Seller shall not unreasonably withhold such consent; and, once given, such consent shall not waive the requirements of this paragraph as to any subsequent assignment of this contract.
14. **DESTRUCTION OF PROPERTY** - In the event of damage to or destruction of any buildings or improvements upon the property, such damage, as between the parties, shall be the loss of the Purchaser and shall not be a ground for rescission of this contract or abatement of purchase price.
15. **DEED** - When Purchaser has fully performed this contract Seller shall execute and deliver to Purchaser a statutory warranty deed conveying the property free and clear of all encumbrances, except any encumbrances agreed to by Purchaser. Warranties of Seller are limited to the date of this contract, except for affirmative acts of Seller thereafter.
16. **TITLE** - Seller shall obtain a standard purchaser's form policy of title insurance showing insurable title in Seller as of the date of this contract, excepting matters herein expressly agreed to by Purchaser or herein expressly provided to be satisfied hereafter by Seller, and insuring Purchaser for the amount of the purchase price of the real property to be sold.
17. **SELLER'S REMEDIES** - Time is of the essence of this contract. If the Purchaser fails to make any payment or perform any obligation hereunder, Seller shall be entitled to exercise all rights and remedies as allowed by law or equity, including the right to elect one or more of the following remedies:
- (1) To forfeit this contract under RCW 61.30, in which event, without limiting any remedies of Seller as provided by the said Statute, all claim, title and interest of Purchaser and parties claiming an interest in the real and/or personal property subject to this contract shall be cancelled and terminated; all prior payments shall be retained by the payee thereof; all improvements and unharvested crops shall be forfeited; and Seller shall be entitled to possession of the real and/or personal property, which right may be enforced under the provisions of RCW 61.12.
 - (2) To declare all amounts payable under this contract immediately due and payable and institute suit to collect such amounts, together with reasonable attorneys' fees provided, if within thirty (30) days after commencement of such action, Purchaser cures the defaults and pays to Seller, Seller's actual attorneys' fees incurred and other taxable costs of suit, this contract shall be reinstated.
 - (3) To commence an action for the collection of past due payments or obligations arising prior to the date of judgment.
 - (4) To commence an action for specific enforcement of Purchaser's obligations under this contract including redress by either a mandatory or prohibitive injunction.
 - (5) If Purchaser is in default under this contract and abandons the real and personal property, if any, subject hereto, pending the exercise of other rights or remedies as provided for herein, Seller may take immediate possession of the real and/or personal property for the purposes of preserving or otherwise protecting the property from loss, damage or waste.
18. **NONWAIVER** - Failure of Seller to insist upon strict performance of Purchaser's obligations hereunder (e.g., accepting late or partial payments) shall not be construed as a waiver by Seller of strict performance thereafter of all of Purchaser's obligations hereunder and shall not prejudice Seller's remedies as provided herein or by law or equity.

1832

any payment or perform any obligation hereunder, Seller shall be entitled to exercise all rights and remedies as allowed by law or equity, including the right to elect one or more of the following remedies:

(1) To forfeit this contract under RCW 61.30, in which event, without limiting any remedies of Seller as provided in the said statute, all right, title and interest of Purchaser and parties claiming an interest in the real and/or personal property subject to this contract shall be cancelled and terminated; all prior payments shall be retained by the payee thereon; all improvements and unimproved crops shall be forfeited; and Seller shall be entitled to possession of the real and/or personal property, which right may be enforced under the provisions of RCW 61.12.

(2) To declare all amounts payable under this contract immediately due and payable and institute suit to collect such amounts, together with reasonable attorneys' fees; provided, if within thirty (30) days after commencement of such action, Purchaser cures the default and pays to Seller, Seller's actual attorneys' fees incurred and other tangible costs of suit, this contract shall be reinstated.

(3) To commence an action for the collection of past due payments or obligations arising prior to the date of judgment.

(4) To commence an action for specific enforcement of Purchaser's obligations under this contract (including orders by either a mandatory or prohibitive injunction).

(5) If Purchaser is in default under this contract and abandons the real and personal property, if any, subject hereto, pending the exercise of other rights or remedies as provided for herein, Seller may take immediate possession of the real and/or personal property for the purposes of preserving or otherwise protecting the property from loss, damage or waste.

18. NONWAIVER - Failure of Seller to insist upon strict performance of Purchaser's obligations hereunder (e.g., accepting late or partial payments) shall not be construed as a waiver by Seller of strict performance (hereinafter) of all of Purchaser's obligations hereunder and shall not prejudice Seller's remedies as provided herein or by law or equity.

19. VENUE - If either party commences an action to enforce their rights under this contract, venue of such action, at the option of Seller, shall lie in Yakima County, Washington.

20. ATTORNEYS' FEES - COSTS - In the event of a lawsuit between the parties to this contract, the prevailing party shall be entitled to recover judgment against the other party for reasonable attorneys' fees and costs (including title and lien searches) incurred either at trial or on appeal.

If either party exercises any nonjudicial right or remedy to enforce such party's rights hereunder, it shall be a condition for the cure of the default that the defaulting party pay the nondefaulting party's reasonable attorneys' fees incurred and all reasonable costs, including costs of service of notices and title and lien searches. Failure to pay such costs and reasonable attorneys' fees shall constitute an event of default under this contract.

21. PURCHASER'S REMEDIES - If Seller defaults with respect to Seller's obligations under this contract, and if such default continues for fifteen (15) days after Purchaser gives Seller written notice specifying the nature of the default and actions necessary to cure the default, Purchaser shall have the right to specifically enforce this contract, institute suit for damages caused by the default or pursue any other remedy allowed by law or equity.

22. BINDING EFFECT - This agreement shall be binding upon and shall inure to the benefit of the legal representatives and proper assigns and successors of the parties.

23. OTHER AGREEMENTS - See Exhibit A attached hereto for OTHER TERMS AND CONDITIONS.

GUARANTORS:

Robert C. Kershaw

Karen Kershaw

Edward R. Kershaw

Mary Ann Kershaw

Ronald Kershaw

Betty A. Kershaw

Seller

KERSHAW SUNNYSIDE RANCHES, INC.

By:

By:

Title

Title Purchaser

Route 8, Box 456, Yakima, WA 98908

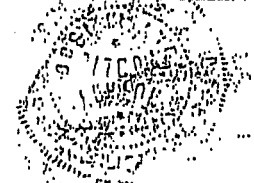
Address of Purchaser

STATE OF WASHINGTON

County of Yakima

I certify that I know or have satisfactory evidence that RONALD KERSHAW and BETTY A. KERSHAW, husband and wife, signed this instrument, and acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in the instrument.

Dated November 23, 1986



Signature of Notary Public in and for the State of Washington
My appointment expires 11/1/87

STATE OF WASHINGTON

County of

I certify that I know or have satisfactory evidence that signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledge it as the of for the uses and purposes mentioned in the instrument to be the free and voluntary act of such party

Dated

Signature of Notary Public in and for the State of Washington

My appointment expires

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EXHIBIT A

Date of Real Estate Contract: November 25, 1986.

Sellers: RONALD KERSHAW and BETTY A. KERSHAW,
husband and wife

Purchaser: KERSHAW SUNNYSIDE RANCHES, INC.,
a Washington corporation

LEGAL DESCRIPTION OF PROPERTY:

Situate in Yakima County, State of Washington

That portion of the Southeast quarter of the Southwest quarter lying Easterly of the Easterly right of way line of the Northern Pacific Railway;
EXCEPT 30 feet for road along the Glead Canal;

AND

That part of the Southwest quarter of the Southeast quarter lying South and West of the following described line:
Beginning 24 feet North of the Southeast corner of the Southwest quarter of the Southeast quarter; thence North 64°30' West 735 feet; thence North 30°20' West 191 feet; thence North 19°10' West 283 feet; thence North 14°35' East 595.5 feet to a point on the North line of the Southwest quarter of the Southeast quarter;
EXCEPT right of way of the Northern Pacific Railway; all in Section 24, Township 14 North, Range 17, E.W.M.,

AND

That part of the Northwest quarter of the Northeast quarter of Section 25, Township 14 North, Range 17, E.W.M., lying North of the Northern Pacific Railway right of way;
EXCEPT beginning on the Northerly right of way line of the Northern Pacific Railway 430 feet Westerly measured along said right of way from the East line of the Northwest quarter of the Northeast quarter; thence Southeasterly along said right of way to the East line of the Northwest quarter of the Northeast quarter; thence North to the Naches Union Canal; thence Westerly along said canal 540 feet to the Erickson Ditch; thence Southeasterly 600 feet along said ditch to point of beginning.

SUBJECT TO rights reserved in federal patents; state or railroad deeds; building or use restrictions general to the area; zoning regulations; utility easements of record; rights of way or easements shown on the plat or visible by inspection; reserved oil and/or mineral rights; and any future adjudication of surface water rights by any appropriate federal and/or state proceeding.

OTHER TERMS AND CONDITIONS:

24. PERSONAL GUARANTY: Robert C. Kershaw and Karen Kershaw, husband and wife, and Edward R. Kershaw and Mary Ann Kershaw, husband and wife, all of whom are principal shareholders of Purchaser corporation, do hereby join as signatory to this Contract for the purpose of evidencing their unconditional and joint and several guaranty of the payment and performance of the Purchaser's obligations with respect to this Real Estate Contract. It is understood that Guarantor wives are only executing this Contract for the purpose of binding their community property, and that by entering into this Contract, they are in no way binding their separate property with respect to the guaranty obligations as created in this paragraph 24.

25. SUBSTITUTE COLLATERAL: Purchaser reserves the right to request to have delivered to it the deed as provided for in paragraph 15, subject to Purchaser or Guarantors providing to Sellers substitute comparable collateral security securing the then obligation owing as evidenced by this Real Estate Contract, but subject to other agreements also entered into by the parties on even date herewith. It is understood that the substitute collateral shall be of such value as to provide reasonable commercial assurance of collateralization for the purpose of securing the unpaid obligation owing to Sellers.

If Purchaser and Sellers and Guarantors are unable to agree upon appropriate substitute collateral, then in such event, upon request by any party, the matter will be submitted to arbitration, to be conducted in accordance with the laws of the State of Washington. The decision of the arbitration shall be binding upon the parties with respect to substitute collateral. If the parties are able to agree upon one arbitrator, then the decision of that one arbitrator shall be binding upon the parties. If, however, the parties are unable to agree upon the selection of one arbitrator, then each shall appoint an independent arbitrator, and the two so selected shall appoint a third independent arbitrator, and the decision of a majority of the arbitra-

tors shall be binding upon the parties. All costs of arbitration shall be borne equally by the Purchaser and Sellers; provided, however, each shall be responsible for paying the costs or fees incurred for the arbitrator selected by that party in the event there are multiple arbitrators involved in the arbitration process as contemplated in this paragraph 25.

It is understood that in the event there is substituted collateral, the provisions of this paragraph 25 shall be carried forward with respect to the new collateral documents so that there shall continually be a right of substituted collateral on the part of Purchaser.

26. DEED: In addition to the provisions of paragraphs 15 and 25, relating to the delivery of a deed to the property, it is specifically understood that by virtue of a separate agreement executed on even date herewith, upon the death of the survivor of the Sellers, a deed to the property shall be delivered to Purchaser. It is further understood that upon the execution of this Contract, Sellers have executed a Statutory Warranty Fulfillment Deed to the said property and have delivered the same, in escrow, to the law offices of Velikanje, Moore & Shore, Inc., P.S., the same to be held in accordance with the terms of this Contract and delivered to Purchaser only upon the events as contemplated by this Contract. In the event the attorneys are unable to determine whether or not the deed should be delivered, the attorneys shall have the right to seek a declaratory judgment or otherwise tender the deed to a court having competent jurisdiction for the purpose of determining the respective rights of all parties with respect to the title and deed to the properties.

27. PRIOR AGREEMENTS: All prior agreements with respect to the subject property, including leases and options, by and between the parties hereto or their affiliates shall be considered as automatically terminated as of the date of the execution of this Contract.

Sellers' Initials B.A.K. Purchaser's Initials [Signature]

Guarantors' Initials ERK

YAKIMA COUNTY

WASH

FILED BY

DEC 18 9 41 AM '06

BETTIE L. BROWN
AUDITOR

EXHIBIT A - J

vol 1198 1836

EXHIBIT B

Washington Territory in consideration of One Hundred and Fifty
(\$150.00) Dollars, to be paid by the said Township of said County
and Territory as hereby conveyed full and entire to said Board
hereinafter this land being known as the Columbia Shoshone
parcel of real estate patented in Victoria County, British Columbia
to wit: —

[illegible][illegible]

[illegible][illegible]

In Witness Whereof We have hereunto set
 hands and seals the 14th day of March 1888
 Signed, sealed and delivered
 (Seal) (Seal)

Your presence of
 Sp. to Sarah Hill
 D. P. Mathews
 R. Frost Parker
 Sp. to Sarah Hill
 W. L. Stearns, Edmund Wright

Direction of Washington
 O. L. C.

EXHIBIT C

Patrick & Annie Carey

Barrenly Dead

James Cleed

This Indenture made the sixth day of June in the second year of our Lord One Thousand Eight Hundred and Sixty One between Patrick Carey and Annie Carey his wife of the County of Washington Territory the Parties of the first part and James Cleed of said Yakima County Wash. Ter. the party of the second part witnesseth. That the said party of the first part, for and in consideration of the sum of One Hundred and fifty Dollars of the United States of America to him hereunto paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed and confirmed and by these presents do grant, bargain, sell convey and confirm unto the said party of the second part his heirs and assigns all that real estate situate in Yakima County Washington Territory and particularly described as follows East 1/2 of S.W. 1/4 and S.W. 1/4 of the S.E. 1/4 of Section 34 and N.W. 1/4 of the N.E. 1/4 of Section 25 in Township 12 North of Range 7 East containing one hundred & fifty Acres

together with all and singular the tenements hereditaments and appurtenances thereto in anywise belonging, and the rents issues and profits thereof

To have and to hold the said premises with the appurtenances unto the said party of the second part his heirs and assigns forever, and though the said parties of the first part hereby warrant to the said party of the second part his heirs and assigns that they do the same in fee simple of said premises yet that they and their heirs and assigns be and shall be bound to defend the same from all lawful claims whosoever

Witness their hands and Seals the sixth day of June

A.D. 1861
 J. P. Church
 J. C. Davidson

Patrick Carey
 Annie Carey

Territory of Washington }
 County of Yakima }

This Certifies that on this sixth day of June

JAMES CLEED
 DEED FROM PAT CAREY

PATENT FROM USA TO PAT CUREY

Attest, this 11th day of September, 1894, the 11th day of September, 1894, in the 4th year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the 47th.

Witness my hand and the seal of the President of the United States at Washington, D.C. this 11th day of September, 1894.

John D. McKean, Secretary of the General Land Office, Department of the Interior, Washington, D.C.

John D. McKean, Secretary of the General Land Office, Department of the Interior, Washington, D.C.

John D. McKean, Secretary of the General Land Office, Department of the Interior, Washington, D.C.

John D. McKean, Secretary of the General Land Office, Department of the Interior, Washington, D.C.

67
quarter of the North East quarter of Section Twenty
Five, in Township Fourteen North of Range Seven, East
East of Willamette Meridian, in Washington Territory
containing One Hundred and Sixty acres, according
to the official plat of the survey of the said land, returned
to the General Land Office by the Surveyor General.
Now knowing that there is no other person entitled by the
United States unto the said Patrick Carey the
tract of land above described. To have and to hold the
said tract of land, with the appurtenances thereof unto
the said Patrick Carey and his heirs and assigns
forever, subject to be used as a canal water
for manufacturing purposes and rights to be used in
connection with such water right, as may be recog-
nized and acknowledged by the local custom, law
and decisions of courts, and as is subject to the
right of the proprietor of a senior title to the tract to
remove his or their premises should the same be found
to penetrate or intersect the premises here by granted
as provided by law.

In testimony whereof, I Chester A. Arthur
President of the United States of America have
caused these letters to be made patent, and the
seal of the General Land Office to be hereunto affixed.
Given under my hand at the City of
Washington, the twentieth day of June
General in the year of our Lord one thousand
and eight hundred and eighty four, and
of the Independence of the United States
the one hundred and eighth.

By the President Chester A. Arthur
Recorded Vol. 2, Page 327 By W. A. Crook Secretary

YAKIMA ABSTRACT AND MILL CO. 11 ANI Section 24 Township 14 Range 17 East

GRANTORS	GRANTEES	DATED FILED				NATURE OF INSTRUMENT	RECORDED		OWN No.	CONSIDERATION	N. E.				N. W.			
		M.	D.	Y.	M.		D.	T.			Vol.	Page	A. C.	N. E.	N. W.	A. C.	N. E.	N. W.
11 O Carey	Elmer	6	6	81	5	24	82	1411	A.	149	150							
12 United States	Manuel Cato	6	30	82	1	27	83	1410	D	64								
13 J. J. Jorgensen	W. O. Eckhardt	8	11	83	8	13	83	1411	C	10	1500							
14 United States	O. Carey	6	20	84	2	14	85	1412	D	66								
15 "	J. J. Jorgensen	12	30	82	9	15	86	1413	C	263								
16 "	J. J. Jorgensen	6	30	82	5	3	83	1414	D	317								
17 "	J. J. Jorgensen	12	30	86	9	12	87	1415	D	200	150							
18 J. J. Jorgensen	J. J. Jorgensen	3	14	87	3	14	87	1416	D	298	300							
19 J. J. Jorgensen	J. J. Jorgensen	4	15	88	5	12	88	1417	D	14	1200							
20 J. J. Jorgensen	J. J. Jorgensen	11	14	88	1	4	89	1418	D	499	600							
21 United States	J. J. Jorgensen	6	5	89	12	30	89	1419	A	154								
22 W. O. Eckhardt	W. O. Eckhardt	12	6	89	12	24	89	1420	F	75	1000							
23 J. J. Jorgensen	W. O. Eckhardt	12	23	89	12	24	89	1421	F	80								
24 W. O. Eckhardt	W. O. Eckhardt	12	6	89	12	31	89	1422	F	70	6450							
25 W. O. Eckhardt	W. O. Eckhardt	-	-	-	3	6	96	1423	F	263								
26 United States	Manuel Cato	3	7	84	10	15	90	1424	M	249	10							
27 Manuel Cato	Manuel Cato	3	7	91	4	11	91	1425	F	334								
28 J. J. Jorgensen	J. J. Jorgensen	7	13	91	7	20	91	1426	F	559	2000							
29 W. O. Eckhardt	W. O. Eckhardt	7	14	91	7	15	91	1427	K	499	5000							
30 Manuel Cato	W. O. Eckhardt	6	22	92	6	23	92	1428	D	112	120							
31 United States	Manuel Cato	6	23	92	6	23	92	1429	D	53	3000							
32 J. J. Jorgensen	J. J. Jorgensen	7	28	92	8	9	92	1430	D	159								
33 J. J. Jorgensen	J. J. Jorgensen	1	9	92	8	9	92	1431	D	162	2000							

YAKIMA ABSTRACT AND MILL CO. 11
Section 24 Township 14 Range 17 East

EXHIBIT D

NORTH COAST RAILWAY.

W. B. ... & W C O M B, County Auditor.

CONTRACT FOR DEED.

THIS AGREEMENT, Made and entered into this 2nd day of october, 1905, between Edward A. Kershaw and Ora A. Kershaw, his wife, parties of the first part, and the NORTH COAST RAILWAY, a corporation organized and existing under the laws of the state of Washington, party of the second part;

WITNESSETH, That said first parties, in consideration of twenty five dollars (\$25.00) to them in hand paid by second party, the receipt whereof is hereby acknowledged, and of other valuable considerations, including the benefits which will result to first parties from the construction of the railroad hereinafter referred to, have agreed, and by these presents do agree, to transfer and convey to said second party, its successors or assigns, a strip of land as hereinafter more particularly described to be used as a right-of-way for, and for the construction of, its Railroad through, over and across the following described lands in Yakima County, Washington, to-wit: That part of the Southwest quarter of the Northwest quarter of Section twenty four (24), Township fourteen (14) North, Range seventeen (17) East of the Willamette Meridian, lying east of the main channel of the Natchez River. Said strip of land to be eighty (80) feet in width, being forty (40) feet on each side of the center line of the proposed railroad of said company, as the same shall hereafter be located, surveyed and staked out across said premises by second party, its agents and engineers, together with any and all additional widths which may be necessary in the construction of said railroad to catch the slopes of the cuts and fills of the road-bed thereof; and

Said first parties further agree that they will, upon demand and upon the completion of necessary surveys and definite location of said railroad and the payment of the further consideration hereinafter specified, and as soon as the construction of any part of said railroad has been commenced, execute and deliver to second party, its successors or assigns, a good and sufficient deed of conveyance for said strip of land, free and clear of incumbrances and containing the usual covenants of warranty; and, in the meantime, said second party, its successors or assigns, shall have the right to enter and complete its surveys and construct its said railroad across said premises.

IT IS UNDERSTOOD AND AGREED, between the parties hereto, that, unless the construction of some portion of said described railroad shall have been commenced within six months from this date, this contract shall become null and void, and all rights

Provided, second party shall within a reasonable time make a survey and definitely locate its said railroad over and across said described premises and first parties will, upon such survey and definite location being made as aforesaid if requested by second party, execute a new contract similar in terms and conditions to this one, except that said described right of way shall be definitely described as so located and established by second party; Provided, also, that second party shall pay to first parties, their heirs or assigns, the further sum of three hundred seventy five dollars (\$375.00) cash, upon the execution of deed for said right of way; Provided, first parties shall have the right to construct a ditch across said right of way at some point to be selected by them, and said railroad shall be so constructed as not to interfere with the use of the same for carrying water for irrigation purposes.

IN WITNESS WHEREOF, said first parties have hereunto set their hands and seals, the day and year first above written.

Witnesses:

James O. Cull

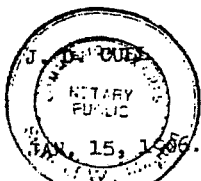
Edward A. Kershaw

Ora A. Kershaw

STATE OF WASHINGTON,)
 : SS.
County of Yakima.)

I, J. O. Cull, a notary public in and for said county and state, do hereby certify that, on this 2nd day of October, 1905, before me personally appeared Edward A. Kershaw and Ora A. Kershaw, his wife, to me known to be the individuals named in and who executed the foregoing instrument and they acknowledged to me that they signed and sealed the same freely and voluntarily, for the uses and purposes therein mentioned.

WITNESS my hand and Official Seal, the day and year in this certificate above written.



J. O. Cull,

Notary Public in and for the State of Washington, residing at North Yakima, Wash.

EXHIBIT E

assigns forever; and the title to the foregoing described premises and every part thereof, they bind themselves and their heirs and legal representatives to forever warrant and defend unto the said L. D. S. Patton, and to his heirs, assigns and legal representatives against the lawful claims of all persons claiming or to claim the same, or any part thereof, except as to taxes for the year 1904, and subsequent years.

WITNESS their hands this 28th day of September, 1905.

executed in presence of

Thomas B. Heggins

Edward Whitson

Nellie B. Whitson

By Edward Whitson her Attorney in fact.

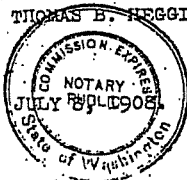
STATE OF WASHINGTON,)
) SS.
County of Spokane.)

On this 28th day of September, 1905, personally appeared before me, the undersigned, a Notary Public in and for said county and state, Edward Whitson, known to me to be the identical person described in and who executed the foregoing instrument and who acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned. I further certify that the said Edward Whitson acknowledged to me that he executed the said instrument as the Attorney in Fact of Nellie B. Whitson, his wife, and as her act and deed freely and voluntarily for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my notarial seal the day and year in this certificate first above written.

Thomas B. Heggins

THOMAS B. HEGGINS



Notary Public in and for the State of Washington, residing at Spokane, in said State.

RIGHT OF WAY DEED.

E. A. KERSHAW ET UX

to

NORTH YAKIMA & VALLEY RAILWAY CO.

Filed for record Oct. 5, 1905 at 1:05 P.M.

At request of Geo. Vance

W. B. NEWCOMB, County Auditor.

THIS INDENTURE, Made this Fourth day of October A. D. 1905, by and between E. A. Kershaw and Ora A. Kershaw, husband and wife, the parties of the first part, and the NORTH YAKIMA & VALLEY RAILWAY COMPANY, a corporation duly organized and existing under the laws of the State of Washington, and having its principal place of business in the City of North Yakima, County of Yakima, State of Washington, the party of the second part,

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WITNESSETH: That whereas the said parties of the first part are the owners of certain real property situate in said County of Yakima, State aforesaid; and the said party of the second part is about to construct a railway over a portion of said premises, the property of said parties of the first part;

AND WHEREAS, said parties of the first part wish to grant said railway company, its successors or assigns, a right of way over a portion of said premises for said railway and also the right to build and construct said railway and operating the same through and over said premises forever.

Granting → NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, That we, the said E. A. Kershaw and Ora A. Kershaw husband and wife, the parties of the first part, for and in consideration of the sum of one thousand & 00 Dollars, lawful money of the United States, to him in hand paid by the said party of the second part and other good and valuable considerations including the covenants of second party, hereinafter contained receipt whereof is hereby acknowledged, do hereby give, grant, sell, confirm and convey to the said party of the second part, the NORTH YAKIMA & VALLEY RAILWAY COMPANY, a Corporation, its successors or assigns, a strip of land seventy five feet wide, in, along, over and through the hereinafter described land in Yakima County, Washington, the property of said party of the first part, to be used by said party of the second part as a right of way for a railway forever; together with the perpetual right to construct, maintain and operate a railway or railways over and across the same. Said strip of land being a certain strip of land seventy five feet wide across the E. 1/2 of S.W. 4 and the S.W. 1/4 of S.E. 4 of Sec. 24 twp. 14 N. R. 17 E. W. M. also the N.W. 1/4 of the N.E. 1/4 of Sec. 25 twp. 14 N. R. 17 E. W. M. being a strip of land seventy five (75) feet in width 37 1/2 feet on each side of the center line of the railroad of said company as the same now is located and staked out across said premises, together with any and all additional widths that may be necessary to catch the slopes of the cuts and fills of the roadbed of said railroad; also across the southwest quarter of the northwest quarter of said section twenty four (24), subject, however, to a right-of-way eighty feet in width heretofore granted by first parties hereto to the North Coast Railway, a corporation, under contract bearing date October 2, 1905, and filed for record in the office of the Auditor of Yakima County, Washington, on October 3, 1905, at 8:25 o'clock A. M. said right-of-way to be hereafter surveyed and located over and across said tract as provided in said contract, and subject to all the rights of said North Coast Railway, a Corporation, under said contract; provided, second party hereto shall not be entitled to the possession of any portion of said above described right-of-way over any portion of said last described tract, until said right-of-way to the North Coast Railway shall have been surveyed and determined as provided in the contract therefore above referred to and then only to the portion of its above described right of way falling outside of the limits of the right of way of said North Coast Railway as the same shall hereafter be determined and fixed.

Habendum → TO HAVE AND TO HOLD the said right of way, strip of land, easements, privileges and appurtenances to it, the said North Yakima & Valley Railway Company, its

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successors or assigns, forever, provided, it is understood and agreed that second party its successors or assigns, shall at its or their own proper cost and expense, provide and maintain over and across said railroad and right of way four suitable and convenient crossings of sufficient width to permit the use thereof of wagons, hay rakes and other ordinary farm machinery, in passing to and from the portions of said premises separated by said railroad and right-of-way with proper approaches and one of which shall be an open crossing, provided with proper cattle guards, and the others may be provided with convenient and suitable gates, which shall be provided and maintained by second party, its successors or assigns. The points at which said crossings shall be provided and maintained to be designated by first parties at time of construction of said railroad; also, it is understood and agreed, that second party, its successors or assigns shall erect and maintain a good and lawful fence on each side of its right of way over and across said described premises; also that second party shall, at its own cost and expense provide suitable means and ways for conducting over and across its said right of way and under its said railroad, any and all water necessary for the proper irrigation of said premises, and of all irrigation ditches now crossing said right of way, at the same relative location as at present and as the same can be used as at present; provided, second party shall also construct and maintain a spur from its main line of railroad, to be located at a point to be designated at time of constructing, said railroad for the use of first parties, their heirs or assigns, in loading produce upon cars upon said premises, the necessary land for said spur to be donated and graded by first parties.

It is understood and agreed that the aforesaid covenants and agreements on the part of second party shall run with said granted right of way and be binding upon said company, and its successors and assigns, so long as a railway may be maintained by it or them, over and across said premises.

Executed the Fourth day of October, 1905.

Witness:

Geo. S. Vance.

Edward A. Kershaw

Ora A. Kershaw

STATE OF WASHINGTON,)
) SS.
County of Yakima.)

On this Fourth day of October, 1905, before me, the undersigned, a notary public in and for said County of Yakima, duly commissioned and sworn, personally appeared Edward A. Kershaw and Ora A. Kershaw, husband and wife, known to me to be the same persons described in and who executed the within instrument and have acknowledged to me that they executed the same, freely and voluntarily and for the uses and purposes therein mentioned; and as their free and voluntary act and deed for said purposes.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Geo. S. Vance,

Notary Public for the State of Washington, residing at North Yakima, Washington.

EXHIBIT F

[illegible]

EXHIBIT 3

SURFACE TRANSPORTATION BOARD

Adverse Abandonment Proceeding

AB Docket No. 600

YAKIMA INTERURBAN LINES ASSOCIATION - ADVERSE ABANDONMENT
in YAKIMA COUNTY, WASHINGTON

ADVERSE ABANDONMENT APPLICATION

a. General

1. Applicant: Kershaw Sunnyside Ranches, Inc. ("Kershaw").
2. Kershaw is not a common carrier subject to 49 U.S.C. Subtitle IV, chapter 105.
3. Kershaw seeks abandonment by Yakima Interurban Lines Association (YILA) of approximately 1 mile of the Naches Line, which consists of approximately 11.29 miles of rail line between milepost 2.97, at Fruitvale, WA, and milepost 14.26, at Naches, WA.
4. There is no system diagram map available for this carrier. Maps showing the location of the rail line are attached as Exhibit B to the Declaration of Robert

Kershaw.

5. None exists to our information and belief. YILA is a noncarrier. The line at issue is the only line held by YILA.

6. Reasons for filing the application:

Kershaw requests that the Surface Transportation Board (Board) authorize the abandonment of a portion of the Naches Line. The Naches line consists of approximately 11.29 miles of rail line between milepost 2.97, at Fruitvale, WA, and milepost 14.26, at Naches, WA.

The rail line was acquired by YILA from Burlington Northern and Santa Fe Railway (BNSF) in 1999 (Finance Docket No. 33719). Kershaw seeks abandonment only of that portion of the line which crosses its property which is approximately one mile. The line traverses United States Postal Service ZIP Code 98908.

The line occupies a railroad right-of-way that was granted in 1905 for railroad purposes only. (Declaration of Robert Kershaw, Exhibit A). BNSF acquired the line in 1996. BNSF took the line out of service in 1997, due to poor track conditions. The line has not been in service and has not had any local traffic on it for approximately seven years. (Declaration of Robert Kershaw, Ex. C).

Shortly after obtaining the line YILA, received a \$516,000 loan from the State of

Washington in order to rehabilitate the line. (Declaration of Robert Kershaw, Exhibit H). YILA mishandled the loan proceeds and what funds remained were not sufficient to rehabilitate the line. YILA was unable to fulfill the terms of the loan agreement and defaulted on the loan. Id.

An April 2001 study by Wilbur Smith Associates reflects a total estimated cost to rehabilitate the line of \$2,014,237. (Declaration of Robert Kershaw, Exhibit F). In addition, according to YILA's operation manager, Jerry Henderson, YILA is "well over a million dollars in debt and has no way of ever paying that debt." (Declaration of Robert Kershaw, Exhibit C, p. 33, lines 1-2). YILA has no current plans or funds to rehabilitate the line. There are currently \$750,000 in liens against the line. (Declaration of Robert Kershaw, Exhibit C, p. 30, lines 6-16). YILA offered to quit claim the line to the State in exchange for forgiveness of the approximate \$516,000 of debt. (Declaration of Robert Kershaw, Exhibit C, p. 19, lines 13-18). The State refused. Id.

As of April 2001, YILA was liquidating its assets. (Declaration of Robert Kershaw, Exhibit C, p. 7). YILA has been "negotiating" with Yakima County and the City of Yakima regarding the line for at least two years. (Declaration of Robert Kershaw, Exhibit C, p. 14). However, no one has initiated any action before the Board and no agreements have been reached. To date, the line remains idle.

The Board will authorize abandonment of a rail line only if "the present or future public convenience and necessity require or permit" abandonment. 49 U.S.C. §10903(d).

The standard for an adverse abandonment is the same standard for abandonments under 49 U.S.C. § 10903. The Board balances the potential burden on shippers and communities against the burden on the rail carrier from continued operation. The record indicates that abandonment of the line is appropriate.

The continued operation of the line by YILA is not economically justified. There has been no traffic on the line for approximately seven years. YILA lacks the resources to repair and maintain its property and cannot cure the numerous defects to bring the line up to Federal Railroad Administration (FRA) standards. Given the amount of liens and the estimated costs of rehabilitating the line, the line is not a viable candidate for any other carrier. (Declaration of Robert Kershaw, Exhibit G).

The burden on shippers and the community if the line were to be abandoned is minimal. The line's former shippers have used alternative transportation services for at least seven years. There is also motor carrier service available via State Highway 12 which is adjacent to the line. Thus, abandonment will not have any material effect on the movement of traffic because alternative transportation is available to and currently used by the former shippers.

Abandonment of the line is also consistent with the public interest. Sufficient traffic is not available to justify continued operation or further investment in the line. Moreover, the line is in disrepair and is completely covered by vegetation in areas. (Declaration of Robert Kershaw, Exhibit F, p.28, ¶ 17.2.1). The line has become a

community eyesore, but also poses numerous hazards. (Declaration of Robert Kershaw, Exhibits E and F). The unchecked growth of vegetation results in a fire hazard of the track and surrounding properties and is a violation of Federal Railroad Administration (FRA) regulations. See 49 C.F.R. § 213.37. In addition, the vegetation also promotes the proliferation of noxious weeds and pests which is of particular concern in this largely agricultural area and is a violation of Washington law. (Declaration of Robert Kershaw, ¶ 12.) See RCW 17.04.010 et. seq.; Washington Administrative Code 16-750-020.

The Board has stated that “where no overriding public interest in continuing rail service in interstate commerce exists, we will not allow our jurisdiction to shield a railroad, or any party seeking relief before us, from the legitimate processes of state law.” See Modern Handcraft, Inc.--Aban., 363 I.C.C. 969 (1981) (Modern Handcraft); Kansas City Pub. Ser. Frgt. Operation--Exempt.--Aban., 7 I.C.C.2d 216, 224-226 (1990); and Chelsea Property Owners--Aban.--The Consol. R. Corp., 8 I.C.C. 773, 778 (1992), *aff'd* sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994). There is no overriding public interest in continuing service on this line. The line at issue has been in legal limbo for several years. The State of Washington refused to accept it. (Declaration of Robert Kershaw, Exhibit C, p. 19, lines 13-18). No other public or private entity has shown any interest in assuming responsibility for the line. Kershaw seeks to bring the line out of purgatory and put the land to beneficial use.

7. All correspondence should be sent to designated representative:

Velikanje, Moore and Shore, P.S.
P.O. Box 22550
405 East Lincoln
Yakima, WA 98907

8. The line traverses United States Postal Service ZIP Code 98908.

b. Condition of properties

The line is in complete disrepair. (See Declaration of Robert Kershaw, Exhibit, F and I.) The line had been inoperable for several years when it was acquired by YILA and YILA has made no significant progress in rehabilitating the line. Currently, the line has numerous and substantial defects and large sections of track are missing. Id.

Cahill Inc., completed a Track Report in April 2001. (Declaration of Robert Kershaw, Exhibit F.) The inspection was limited by snow and the amount of vegetation on the line. (Declaration of Robert Kershaw, Exhibit F, p.3). Nonetheless, the inspector noted numerous and substantial repairs would be necessary “just to make the line passable.” (Declaration of Robert Kershaw, Exhibit F, p.3 and Appendix A). The inspector further stated that “[i]t can be said with certainty that the line has FRA Class 1 defects that are not listed in this report.” (Declaration of Robert Kershaw, Exhibit F, p. 3.) The total estimated cost to rehabilitate the line is \$2,014,237. (Declaration of Robert Kershaw, Exhibit F.)

Since the line has been out of service, vegetation on the line has been a constant

problem. (Kershaw, ¶ 12). Because the line runs through apple orchards, Kershaw sprays the line with herbicides five to six times a year to reduce the prevalence of noxious weeds and other pests detrimental to the apple crop. Id. In the areas not sprayed with herbicides on a regular basis, the line is covered with thick woody vegetation. (Kershaw, ¶ 12, Ex. J).

In addition, the line is difficult and sometimes dangerous to cross over. Portions of the line on the Kershaw property are covered with rock and debris. (Declaration of Robert Kershaw, Exhibit J.) In other places, the rail bed has eroded so completely that the ties are actually suspended by the rail. (Declaration of Robert Kershaw, Exhibit J.)

c. Service Provided

There has been no service on the line in the base year or in any year since 1997. The lines are in disrepair and YILA has no funds with which to repair them. In addition, even if the tracks were operable, YILA does not have an operable locomotive.

(Declaration of Robert Kershaw, Exhibit C, p.15, lines 10-22).

1. No trains have operated on the line during the base year.
2. No miles of track have been operated during the base year.
3. No locomotive units have operated during the base year.
4. No tonnage or carloads of any commodity have moved on the line in the base year.
5. There has been no overhead or bridge traffic during the base year.

6. There have been no crews on the line during the base year.
7. No maintenance has been performed on the line during the base year.
8. There has been no change in train service on the line in the last two years.
9. BNSF took the line out of service in 1997 due to poor track conditions resulting in decline in traffic.

d. Revenue and cost data.

1. Revenues and Costs for Base Year: Pursuant to its bylaws, YILA is a non-profit organization. (Declaration of Robert Kershaw, Exhibit C, p. 21, lines 6-12).

There are no revenues attributable to the line for the base year. The avoidable costs to YILA if the line is abandoned is unknown.

2. Revenues and Costs for Forecast Year: According to YILA's operation manager, Jerry Henderson, YILA is "well over a million dollars in debt and has no way of ever paying that debt." (Declaration of Robert Kershaw, Exhibit C, p. 33, lines 1-2). YILA has no current plans or funds to rehabilitate the line. There are currently \$750,000 in liens against the line. (Declaration of Robert Kershaw, Exhibit C, p. 30, lines 6-16). Therefore, there are no foreseeable future revenues, avoidable costs or reasonable returns for the Forecast year.

3. The estimated subsidy payment for the Base year, if any, is unknown.

e. Rural and community impact

1. There are no stations on the line. Based on the United States 2000 census

information, the population of Yakima County is 222,581.

2. The line has been out of service since 1997. There are no significant users as defined by 49 C.F.R. § 1552.2(1).

3. There are other rail lines nearby which are currently meeting the needs of shippers in the area. State Highway 12 is adjacent to the line and is readily accessible to meet transportation needs.

4. The land may not be appropriate for other public uses. The line passes through the middle of Kershaw's property. (Kershaw, ¶ 11). On one side of the line is apple orchard; on the other side of the line there is a warehousing operation. Id. Both activities present health and safety concerns if the land is put to public use.

First, Kershaw applies pesticides to the orchard numerous times a year. (Kershaw, ¶ 13). Under Washington law, no person, other than an "appropriately trained and equipped handler" may enter and remain in an area that has been treated with agricultural pesticides. Washington Administrative Code 296-307-12015. The timing and location of pesticide application are dependent upon numerous factors including weather and wind speed and direction. (Kershaw, ¶ 13). The logistics of restricting public access to the area during pesticide application is problematic.

Second, there are four designated rail crossings on the Kershaw property. These crossings are traversed daily by heavy machinery including forklifts, tractors, trucks and other farming equipment. (Kershaw, ¶ 14). If this land were put to public use, it would

be difficult to maintain normal business operations. Id.

More importantly, with the periodic application of pesticides and the constant moving of heavy equipment, it would be extremely difficult to ensure the safety of the public. Id. There would be a greater risk of liability and markedly increased insurance costs.

In addition, the right-of-way originally granted in 1905 was for railroad purposes only. (Declaration of Robert Kershaw, Exhibit A). Kershaw holds a reversionary interest in the property. Id.

f. Environmental impact.

The line has not been operating for approximately seven years. An official abandonment of the line will not significantly alter the condition of the surrounding land and environment. Kershaw has submitted an environmental report pursuant to 49 C.F.R. §§1105.

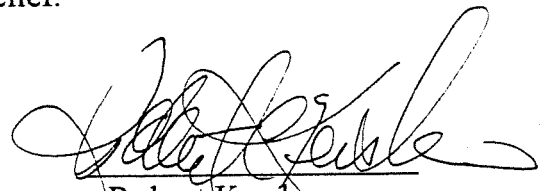
g. Passenger service

There is no passenger service on the line.

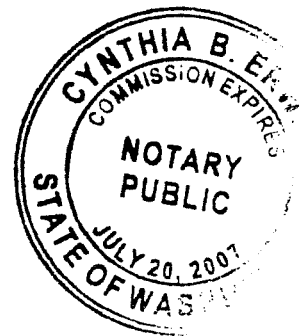
State of Washington
County of Yakima

Robert Kershaw, makes oath and says that he is the President of Kershaw Sunnyside Ranches, Inc. applicant herein; that he has been authorized by the applicant to verify and file with the Surface Transportation Board the foregoing application in STB-AB 600; that he has carefully examined all the statements in the application as well as the exhibits attached thereto and made a part thereof; that he has knowledge of the facts and matter

relied upon in the application and that all representations set forth therein are true and correct to the best of his knowledge information, and belief.


Robert Kershaw

Subscribed and sworn to before me, Cindy Erwin in and for the State and County above named, this 1st date of July, 2003.



SURFACE TRANSPORTATION BOARD

Adverse Abandonment Proceeding

AB Docket No. 600

CERTIFICATION

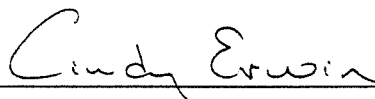
I am Cindy Erwin. I hereby certify under penalty of perjury of the laws of the State of Washington that the following statements are true and correct.

I am one of the employees of the attorneys for Kershaw Sunnyside Ranches in the above-entitled matter; that I am a citizen of the United States, a resident of Yakima County, Washington, over the age of twenty-one years, and not a party to said action. On the 8th day of October 2003, I caused to be deposited via UPS Next Day Air, an original and 10 copies of the Adverse Abandonment Application to the Surface Transportation Board. Additionally, on the 8th day of October 2003, I caused to be deposited in the United States mail, via First Class Mail, postage prepaid, the following:

Adverse Abandonment Application

to the addresses attached to this Certification.

Dated at Yakima, Washington this 8th day of October 2003.


Cindy Erwin

Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Governor Gary Locke
Office of the Governor
P.O. Box 40002
Olympia, WA 98504-0002

Mike Rowsell
WUTC
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Olympia, WA 98504-7250

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WSDOT - Rail Office
P.O. Box 47387
Olympia, WA 98507-7387

Dr. Michael Tate, Dean and Director
State Cooperative Extension Service
P.O. Box 646230
Pullman, WA 99164-6230

Theo Thomas
State Cooperative Extension Service - Yakima Office
128 North 2nd Street, Room 233
Yakima, WA 98901-2631

Federal Rail Road Administration
Attn: Joseph Pampoino
1120 Vermont Avenue, NW, 7th Floor
Washington, DC 20590

Col. John Hoffman
Military Traffic Management Command
Attn: MT-JA, RM 12N67
200 Stovall Street
Alexandria, VA 22332-5000

Tom Ross, Assistant Director
National Center for Recreation & Conservation
1849 C Street NW
Washington, DC 20240

US Department of Agriculture
Chief of the Forest Service
Dale Bosworth
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Mr. William Cooper
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MTMC Transportation Engineering Agency
720 Thimble Shoals Boulevard, Suite 130
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Washington State Attorney General's Office
120 South Third
Yakima, WA 98901-2869

Washington Department of Fish and Wildlife
Attention: Ken Bevis
Yakima Screen Shop
3705 W. Washington Avenue
Yakima, WA 98902-1137

Washington State Department of Ecology – Water Quality
Central Regional Office
15 West Yakima Avenue, Suite 200
Yakima, WA 98902-3452

Yakima County
128 N. 2nd Street
Yakima, WA 98901

U.S. Fish and Wildlife Service
Mark Miller, Supervisor
215 Melody Lane, Suite 119
Wenatchee, Washington 98801

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Zillah, WA 98953-9764

National Park Service Headquarters
Director
1849 C Street NW
Washington, DC 20240

National Geodetic Survey
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1315 East-West Highway
Silver Spring, MD 20910-3282

Yakima County Assessor's Office
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Courthouse Room 112
Yakima, WA 98901

Region 10
Environmental Protection Agency
1200 Sixth Avenue
Seattle, WA 98101

U.S. Army Corp of Engineers
4735 East Marginal Way South
Seattle, WA 98134-2385

16182ce

EXHIBIT 4

SURFACE TRANSPORTATION BOARD DECISION DOCUMENT**Decision Information**Docket Number: **AB_600_0**Case Title: **YAKIMA INTERURBAN LINES ASSOCIATION--ADVERSE
ABANDONMENT--IN YAKIMA COUNTY, WA**Decision Type: **Decision**Deciding Body: **Entire Board****Decision Summary**

Decision Notes: **DENIED THE APPLICATION OF KERSHAW SUNNYSIDE RANCHES, INC. FOR ADVERSE ABANDONMENT OF APPROXIMATELY 1 MILE OF THE 11.29-MILE NACHES LINE, IN YAKIMA COUNTY, WA, OWNED BY YAKIMA INTERURBAN LINES ASSOCIATION.**

Full Text of Decision34751
EB

SERVICE DATE – NOVEMBER 19, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-600

YAKIMA INTERURBAN LINES ASSOCIATION–
ADVERSE ABANDONMENT–IN YAKIMA COUNTY, WA

Decided: November 18, 2004

On January 27, 2004, Kershaw Sunnyside Ranches, Inc. (Kershaw or applicant) filed an adverse abandonment application ☞ under 49 U.S.C. 10903, asking us to find that the public convenience and necessity (PC&N) require or permit the abandonment of approximately 1 mile of the 11.29-mile Naches Line owned by Yakima Interurban Lines Association (YILA) in Yakima County, WA. ☞ Protests were filed jointly by Yakima County, the City of Yakima, the Town of Naches, and YILA ☞ (Rail Commenters), and individually by Level 3 Communications, L.L.C. (Level 3), Washington State Department of Transportation (WSDOT), and The Burlington Northern and Santa Fe Railway Company (BNSF). Applicant filed a reply. We will deny the application for the reasons discussed below.

BACKGROUND

The Naches Line passes through approximately 1 mile of Kershaw's property. In 1905, a predecessor in interest to Kershaw granted an easement for railroad purposes to the North Yakima & Valley Railway Company. The description of the segment contained in the deed granting the easement

reads as follows:

Said strip of land being a certain strip of land seventy five feet wide across the E.2 of S.W. 4 and the S.W.4 of S.E.4 of Sec. 24 twp. 14 N. R. 17 E. W. M. [A]lso the N.W.4 of the N.W. 4 of Sec. 25 twp. 14 N. R. 17 E. W.M. being a strip of land seventy five (75) feet in width 37½ feet on each side of the center line of the railroad of said company as the same [is now] located and staked out across said premises, together with any and all additional widths that may be necessary to catch the slopes of the cuts and fills of the roadbed of said railroad.

Mileposts for the segment on Kershaw's property are unavailable. The Naches Line was acquired by BNSF in 1996, but was taken out of service in 1997 due to poor track conditions. In 1999, YILA acquired 11.29 miles of the line, from MP 2.97 at Fruitvale, WA, to MP 14.26 at Naches, WA. Yakima Interurban Lines Association–Acquisition Exemption–BNSF Acquisition, Inc., STB Docket Finance Docket No. 33719 (STB served Mar. 4, 1999).

The State of Washington, through WSDOT, subsequently loaned YILA \$516,000 for line rehabilitation. YILA, however, failed to rehabilitate the line and defaulted on the loan. Members of the board of YILA, including its president, have abdicated their positions, and the operations manager has been directed by the members of the association to dispose of YILA's assets. There are currently \$750,000 in liens against the line and there has been no local traffic on the line for the last 7 years. YILA has been negotiating for the last 2 years with Yakima County and the City of Yakima regarding the future of the line.

POSITIONS OF THE PARTIES

Kershaw seeks abandonment authorization for the portion of the Naches Line that crosses its property because, it argues, operation of the line is not economically justified and is detrimental to Kershaw's property interests. Kershaw contends that it is unlikely that any entity could make the line profitable. It estimates that rehabilitation costs needed to meet Federal Railroad Administration (FRA) Class 2 standards, not including the \$750,000 in liens against the line, would exceed \$2 million. ☹ Kershaw maintains that the burden on shippers caused by abandonment would be minimal, as the line has been out of service for 7 years. Kershaw also points out that State Highway 12 is adjacent to the line and, therefore, shippers have transportation alternatives. Further, Kershaw argues that the line is in complete disrepair, is covered in thick vegetation, and has become a community eyesore that poses numerous hazards, including fire, noxious weeds, and pests, in an agricultural area. Citing Modern Handcraft, Inc.–Abandonment, 363 I.C.C. 969 (1981) (Modern Handcraft), Kershaw argues that there is no overriding public interest in continuing service on the line. Kershaw states that, should the Board grant abandonment authority, it would proceed in state court to obtain control of the property.

In their protest filed on March 12, 2004, Rail Commenters oppose Kershaw's request. Citing RLTD Railway Corp. v. STB, 166 F.3d 808 (6th Cir. 1999), they argue, inter alia, that if abandonment of only the 1-mile segment of rail line on its property were granted, the remainder of the line would be de facto abandoned. Specifically, Rail Commenters assert that granting the 1-mile abandonment proposed would also result in abandonment of the severed line north into Naches and would render the southern remnant at the Yakima end unusable because there are not adequate facilities for storage or turning of equipment on the southern end.

Rail Commenters assert that there is substantial potential for rail service and they present a plan to clear liens from the line, and have Yakima County acquire the line, arrange for rehabilitation, and contract with a third party to reinstate rail service to area shippers. The Toppenish, Simcoe & Western

Railroad states that it is willing and able to contract with Yakima County to provide rail service over the Naches Line. ¶ Two area shippers of wood products, Layman Lumber Company, at Naches, and Nepa Pallet & Container Co., Inc., at Yakima, oppose the abandonment, support rehabilitation of the line, and state that they would make use of the line in the future. ¶ As a fallback position, Rail Commenters request that, should we authorize abandonment, we do so for the entire line and also authorize interim trail use/rail banking for the Naches line.

Level 3 also opposes the application in a protest filed on March 15, 2004. Level 3 states that it has contracted with both the current owner of the Naches Line (YILA) and its predecessor (BNSF) for the right to lay fiber optic telecommunications cable in the right-of-way (ROW). Level 3 also states that public utilities use a water main located on the ROW to provide water to the City of Yakima. Level 3 argues that Washington state law recognizes its right, and that of public utilities, to use the ROW to provide essential public services.

In a protest filed on March 12, 2004, WSDOT opposes the abandonment. It agrees with Rail Commenters that, if the 1-mile segment in the middle of the line that crosses Kershaw's property were to be abandoned, the remainder of the line would also have to be abandoned. According to WSDOT, if the line were rerouted around Kershaw's property, the cost of reconstruction would be approximately \$974,480, an amount far exceeding the funds WSDOT expects to have available for rehabilitation of the line.

In a short letter filed on March 12, 2004, BNSF, whose line connects to YILA's portion of the Naches Line at milepost 2.97, supports Yakima County's desire to retain the line for rail service, and BNSF states that it "anticipates that the line will be restored to rail service shortly." BNSF adds that, when this occurs, the line will play an integral role in moving goods to and from customers located on it. BNSF adds that restoration of rail service will lessen truck traffic on the adjacent highway system in the area.

In a reply filed on May 5, 2004, Kershaw notes that it has only sought to abandon the portion of the line which crosses its property. It argues that the plan to resume rail service is neither economically feasible nor practicable, as there are insufficient funds available to clear liens and rehabilitate the line, and that anticipated future traffic is much too speculative in nature. Kershaw contends that, if Rail Commenters wish to restore rail service, they should file an offer of financial assistance under 49 U.S.C. 10904(c). Kershaw also questions Yakima County's intent to operate a trail over the property in the event of abandonment.

DISCUSSION AND CONCLUSIONS

Applicable Legal Standards

Under 49 U.S.C. 10903(d), the standard governing any application to abandon or discontinue service over a line of railroad, including an adverse abandonment or discontinuance, is whether the present or future PC&N require or permit the proposed abandonment or discontinuance. In implementing this standard, we must balance the competing benefits and burdens of abandonment or discontinuance on all interested parties, including the railroad, the shippers on the line, the communities involved, and interstate commerce generally. See *New York Cross Harbor R.R. v. STB*, 374 F.3d 1177, 1180 (2004) (*Cross Harbor*); *City of Cherokee v. ICC*, 727 F.2d 748, 751 (8th Cir. 1984). In making our determination of what is in the public interest, "the Board shall [also] consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development." 49 U.S.C. 10903(d). And we must take the goals of the Rail Transportation Policy (RTP) into consideration in making our public interest determinations. 49 U.S.C. 10101.

We have exclusive and plenary jurisdiction over abandonments in order to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. See Modern Handcraft, 363 I.C.C. at 972. Accordingly, we preserve and promote continued rail service where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. See Chelsea Property Owners — Abandonment — Portion of the Consolidated Rail Corp.'s West 30th Street Secondary Track in New York, NY, 8 I.C.C.2d 773, 779 (1992) (Chelsea), aff'd Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994) (Conrail). On the other hand, we do not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where no overriding Federal interest exists. See CSX Corporation and CSX Transportation, Inc.—Adverse Abandonment Application—Canadian National Railway Company and Grand Trunk Western Railroad, Inc., STB Docket No. AB-31 (Sub-No. 38) (STB served Feb. 1, 2002).

If we conclude that the PC&N does not require or permit continued operations over the track by the carrier in question, our decision removes that shield, thereby enabling the applicant to pursue other legal remedies to force the carrier off the line. Conrail, 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972. But applications for adverse abandonment have historically been denied if there is a potential for continued operations and the carrier has taken reasonable steps to attract traffic. See Cross Harbor, 374 F.3d at 1186; Conrail, 29 F.3d at 711, aff'g Chelsea, 8 I.C.C.2d at 778. In abandonment cases, the applicant (in this case the third party) has the burden of proof. Here, after considering the arguments and balancing the interests of all concerned, we conclude that Kershaw has failed to demonstrate that the adverse abandonment of the 1-mile segment of the Naches Line meets the PC&N test.

PC&N Analysis

The record here does not support a finding that the PC&N require or permit abandonment. It is true that the line has not carried traffic in some years and is in serious disrepair, but this is due to YILA's failure as an operator of the line. Shippers located on the ROW have stated that they would use rail service if restored. The Toppenish, Simcoe & Western Railroad has expressed interest in operating of the line on behalf of Yakima County, and BNSF, the line-haul railroad whose system connects the Naches Line with the interstate rail network, also supports reactivation of the line. The local governments oppose the proposed abandonment and support the restoration of rail service, and they have expressed their willingness to expend the funds necessary to accomplish reactivation. WSDOT has stated that it will provide an estimated \$200,000 in financial assistance to Yakima County to acquire the line from YILA and to clear the liens on the title, and an estimated \$300,000 to complete restoration of the line. This sum is in addition to the \$516,000 loan by WSDOT to YILA, on which YILA defaulted, and appears to be sufficient to return the line to FRA Class 1 standards. See Declaration of Robert Kershaw in Support of Adverse Abandonment Application, Exh. F at 110, 151 (filed Dec. 11, 2003) (providing \$200,000 and \$288,300 estimates). Thus, there is clearly potential for continued rail service over the Naches Line.

This case is similar to City of Colorado Springs—Petition for Declaratory Order—Abandonment Determination, Finance Docket Nos. 31271 and 31230 (ICC served Mar. 22, 1989) (Colorado Springs), where the agency denied a request for adverse abandonment of a line that had been rendered inactive by washouts and over-paving. There, efforts were being made to solicit through traffic for the line, the carrier demonstrated an ongoing interest in preserving the line as part of a longer rail corridor, and substantial public funding had been committed to preservation of the rail corridor as a whole. Id. at 6-7. This case differs from Modern Handcraft, 363 I.C.C. at 971-72, where there had been no traffic over the line for 12 years, the line was physically inoperable, and the carrier had made no serious effort to solicit traffic or reinstate rail service. In contrast here, the governmental entities proposing to reinstate operations have feasible plans to do so. In addition, shippers along the ROW have indicated their

interest in using rail service if it were again available over the line.

We realize that Kershaw has legitimate concerns here, related to YILA's management of the property. First, Kershaw cites the expense it incurs in spraying herbicides on the ROW 5-6 times annually. It must incur this expense, applicant maintains, because the unchecked growth of vegetation in the ROW creates a fire hazard and promotes the proliferation of noxious weeds and pests. Second, Kershaw cites difficulty in crossing over the line because parts of it are covered by rocks and debris. These problems should end when rehabilitation of the line is completed and rail service is restored.

Further, granting Kershaw's application would likely defeat local efforts to restore rail service and could have an adverse impact on rural and community development in Yakima County. Conversely, restoration of rail service could have a positive impact by converting truck traffic to rail. Finally, the record also indicates that denial of the proposed abandonment will be consistent with the goals of the RTP, particularly 49 U.S.C. 10101(4), which is to ensure the development and continuation of a sound rail transportation system.

For all of these reasons, we conclude that the public is best served by denying the adverse abandonment application. Given the evidence before us, we cannot find that the prospect for continued rail service, or the need for that service, is as negligible as Kershaw would have us find, and we cannot find that the relief Kershaw seeks outweighs the public interest in rail service on this line. We note that our finding is without prejudice to Kershaw's seeking to reopen or file a new abandonment application, should the proposed rehabilitation and restoration not occur within a reasonable period of time.

Other arguments raised by the parties not relevant to the disposition of this matter have not been discussed here.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Kershaw's application is denied.
2. This decision will be effective on December 19, 2004.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary

Decision Attachments

34751.pdf	16 KB
34751.wpd	33 KB
34751.htm	29 KB

Size of PDF File: 0.03 MB

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SERVICE DATE – NOVEMBER 19, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-600

YAKIMA INTERURBAN LINES ASSOCIATION–
ADVERSE ABANDONMENT–IN YAKIMA COUNTY, WA

Decided: November 18, 2004

On January 27, 2004, Kershaw Sunnyside Ranches, Inc. (Kershaw or applicant) filed an adverse abandonment application¹ under 49 U.S.C. 10903, asking us to find that the public convenience and necessity (PC&N) require or permit the abandonment of approximately 1 mile of the 11.29-mile Naches Line owned by Yakima Interurban Lines Association (YILA) in Yakima County, WA.² Protests were filed jointly by Yakima County, the City of Yakima, the Town of Naches, and YILA³ (Rail Commenters), and individually by Level 3 Communications, L.L.C. (Level 3), Washington State Department of Transportation (WSDOT), and The Burlington Northern and Santa Fe Railway Company (BNSF). Applicant filed a reply. We will deny the application for the reasons discussed below.

BACKGROUND

The Naches Line passes through approximately 1 mile of Kershaw's property. In 1905, a predecessor in interest to Kershaw granted an easement for railroad purposes to the North Yakima & Valley Railway Company. The description of the segment contained in the deed granting the easement reads as follows:

Said strip of land being a certain strip of land seventy five feet wide across the
E.2 of S.W. 4 and the S.W.4 of S.E.4 of Sec. 24 twp. 14 N. R. 17 E. W. M.

¹ Kershaw had previously filed certain components of its application. The application was not considered complete, however, until applicant submitted the final required components on January 27, 2004.

² Notice of the filing was served and published in the Federal Register (69 FR 7283) on February 13, 2004. Applicant's petition for waiver of certain regulations pertaining to the Board's application procedures for obtaining rail line abandonment authority was granted in part by a decision served on February 6, 2004.

³ YILA is a Washington State non-profit corporation.

NOV 29 2004

In their protest filed on March 12, 2004, Rail Commenters oppose Kershaw's request. Citing RLTD Railway Corp. v. STB, 166 F.3d 808 (6th Cir. 1999), they argue, inter alia, that if abandonment of only the 1-mile segment of rail line on its property were granted, the remainder of the line would be de facto abandoned. Specifically, Rail Commenters assert that granting the 1-mile abandonment proposed would also result in abandonment of the severed line north into Naches and would render the southern remnant at the Yakima end unusable because there are not adequate facilities for storage or turning of equipment on the southern end.

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⁵ Appendix I, Exhibit C, to Rail Commenters Joint Protest.

⁶ Appendix I, Exhibit B, to Rail Commenters Joint Protest.

If we conclude that the PC&N does not require or permit continued operations over the track by the carrier in question, our decision removes that shield, thereby enabling the applicant to pursue other legal remedies to force the carrier off the line. Conrail, 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972. But applications for adverse abandonment have historically been denied if there is a potential for continued operations and the carrier has taken reasonable steps to attract traffic. See Cross Harbor, 374 F.3d at 1186; Conrail, 29 F.3d at 711, aff'g Chelsea, 8 I.C.C.2d at 778. In abandonment cases, the applicant (in this case the third party) has the burden of proof. Here, after considering the arguments and balancing the interests of all concerned, we conclude that Kershaw has failed to demonstrate that the adverse abandonment of the 1-mile segment of the Naches Line meets the PC&N test.

PC&N Analysis

The record here does not support a finding that the PC&N require or permit abandonment. It is true that the line has not carried traffic in some years and is in serious disrepair, but this is due to YILA's failure as an operator of the line. Shippers located on the ROW have stated that they would use rail service if restored. The Toppenish, Simcoe & Western Railroad has expressed interest in operating of the line on behalf of Yakima County, and BNSF, the line-haul railroad whose system connects the Naches Line with the interstate rail network, also supports reactivation of the line. The local governments oppose the proposed abandonment and support the restoration of rail service, and they have expressed their willingness to expend the funds necessary to accomplish reactivation. WSDOT has stated that it will provide an estimated \$200,000 in financial assistance to Yakima County to acquire the line from YILA and to clear the liens on the title, and an estimated \$300,000 to complete restoration of the line. This sum is in addition to the \$516,000 loan by WSDOT to YILA, on which YILA defaulted, and appears to be sufficient to return the line to FRA Class 1 standards. See Declaration of Robert Kershaw in Support of Adverse Abandonment Application, Exh. F at 110, 151 (filed Dec. 11, 2003) (providing \$200,000 and \$288,300 estimates). Thus, there is clearly potential for continued rail service over the Naches Line.

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EXHIBIT 5

EMPLOYER STATUS DETERMINATION
Yakima Interurban Lines Association d/b/a
Yakima Electric Railway Museum

This is the determination of the Railroad Retirement Board concerning the status of Yakima Interurban Lines Association (YILA) d/b/a Yakima Electric Railway Museum (YER) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

YILA was incorporated in November 1983 in the State of Washington in order to operate a railroad for the purpose of promoting tourism. YILA began to operate YER in 1985. A brochure about YER describes the YILA operation as an electric trolley ride of 1 hour and 40 minutes between Yakima Electric Railway Museum in Yakima, Washington and Selah, Washington. The brochure indicates that this excursion service operates on Saturday, Sunday, and holidays from early May to mid-October and once a day on week nights in July and August.

The brochure also states that YILA is a non-profit historical and educational association, which operates the electrified rail system of Yakima Valley Transportation Company under an agreement with the City of Yakima. YILA has 501(c)(3) status with the Internal Revenue Service, which means that all contributions to YILA are fully tax-deductible.

Mr. Paul D. Edmondson, President of YILA, stated that YILA has 3 part-time temporary employees, but uses primarily volunteers to provide labor. The brochure states that more than 80 volunteers regularly serve as motorpersons, conductors, historical interpreters, ticket salespersons, maintenance persons, grant writers, and bookkeepers.

Section 1 of the RRA defines the term "employer" to include:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49. [45 U.S.C. §231(a)(1)(i)].

Section 1 of the RUIA contains essentially the same definition.

Part A of subtitle IV of Title 49 provides in pertinent part that the Surface Transportation Board (STB) has jurisdiction over railroad transportation in the United States between a place in:

(A) a State and a place in the same or another State as part of the interstate rail network. [49 U.S.C. §10501(a)(2)(A)].

The rail service operated by YILA is not a part of an interstate rail network. Rather, YILA operates an excursion railroad which is not subject to STB jurisdiction under the provision quoted above. The Board therefore finds that YILA is not an employer under the RRA and the RUIA.

Glen L. Bower

V. M. Speakman, Jr.

**Yakima Interurban Lines Association d/b/a
Yakima Electric Railway Museum**

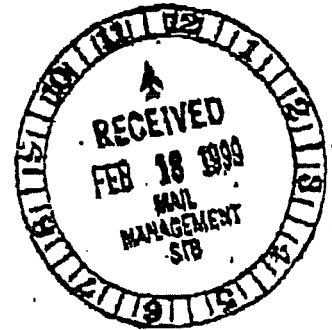
Jerome F. Kever

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C. 491-96

EXHIBIT 6

EXHIBIT CBEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33719

YAKIMA INTERURBAN LINES ASSOCIATION
-ACQUISITION EXEMPTION-
BNSF ACQUISITION, INC.VERIFIED NOTICE OF EXEMPTION
Pursuant to 49 C.F.R. § 1150.31, Et Seq.

Yakima Interurban Lines Association ("Yakima"), a non-carrier, files this Notice of Exemption pursuant to 49 C.F.R. Part 1150, Subpart D-Exempt Transactions, to permit Yakima to acquire a 11.29-mile rail line located in the State of Washington and now owned by BNSF Acquisition, Inc., successor in interest to Washington Central Railroad Company ("BNSF Acquisition").

In support of this Notice of Exemption, Yakima submits the following information as required by 49 C.F.R. § 1150.33:

(a) Full name and address of applicant:

Yakima Interurban Lines Association
306 W. Pine
Yakima, Washington 98902

(b) Applicant's Representative:

Karl Morell
Of Counsel
BALL JANIK LLP
Suite 225
1455 F Street, N.W.

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(c) Statement of Agreement:

Yakima has entered into an agreement with BNSF Acquisition to acquire the rail line.

(d) The operator of the property:

Yakima will be the exclusive operator of the rail line.

(e) Summary of proposed transaction:

Yakima seeks to acquire, by donation, the rail line located between Fruitvale and Naches, Washington from BNSF Acquisition.

(1) The name and address of the railroad transferring the subject property is:

BNSF Acquisition, Inc.
2650 Lou Menk Drive
Fort Worth, Texas 76131

(2) Yakima's acquisition of the rail line is expected to be consummated on or shortly after February 25, 1999.

(3) The rail line being acquired by Yakima is located between milepost 2.97, at Fruitvale, and milepost 14.26, at Naches, Washington.

(4) The length of the rail line being acquired is 11.29 miles.

(f) A map of the rail line being acquired is attached as Exhibit 1.

(g) Yakima hereby certifies that its projected revenues as a result of this transaction will not exceed those that would qualify it as a Class III rail carrier. Yakima further certifies

that its projected annual revenue will not exceed \$5 million. Accordingly, the requirements of 49 C.F.R. § 1150.32(e) do not apply to this transaction.

A caption summary, as required by 49 C.F.R. § 1150.34, is attached.

ENVIRONMENTAL AND HISTORIC IMPACTS

Yakima is acquiring the rail line from BNSF Acquisition for continued rail operations. Further Surface Transportation Board ("STB") approval is required for Yakima to abandon any service, and there are no plans to dispose of or alter properties subject to STB jurisdiction that are 50 years old or older. Hence, this Notice of Exemption does not require an historic report under 49 C.F.R. § 1105.8(b)(1).

Yakima's acquisition of the rail line will not result in significant changes in carrier operations. There will not be a diversion of: (1) more than 1,000 rail carloads a year to motor carriage; or (2) an average of 50 carloads per mile per year for any part of this line to motor carriage. This transaction will not result in: (1) an increase in rail traffic of at least 100 percent or an increase of at least eight trains a day on any segment of the line; (2) an increase of rail yard activity of at least 100 percent; or (3) an average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day. Yakima's acquisition of the rail line will not affect a Class I or nonattainment area under the Clean Air Act. In any event, the thresholds of 49 C.F.R. § 1105.7(e)(5)(ii) will not be exceeded. Finally, the transportation of ozone depleting materials is not contemplated. Therefore, no environmental documentation is required under 49 C.F.R. § 1105.6(c)(2).

This action will not significantly affect either the quality of the human environment or energy conservation.

Respectfully submitted,



KARL MORELL

Of Counsel

BALL JANIK LLP

Suite 225

1455 F Street, N.W.

Washington, DC 20005

(202) 638-3307

Attorney for:

YAKIMA INTERURBAN LINES ASSOCIATION

Dated: February 18, 1999

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

FINANCE DOCKET NO. 33719

YAKIMA INTERURBAN LINES ASSOCIATION
-ACQUISITION EXEMPTION-
BNSF ACQUISITION, INC.

Yakima Interurban Lines Association ("Yakima"), a non-carrier, has filed a Verified Notice of Exemption to acquire approximately 11.29 miles of rail line from BNSF Acquisition, Inc., between milepost 2.97, at Fruitvale, WA, and milepost 14.26, at Naches, WA.

Comments must be filed with the Board and served on Karl Morell, Of Counsel, BALL JANIK LLP, Suite 225, 1455 F Street, N.W., Washington, DC 20005, (202) 638-3307.

This Notice is filed under 49 C.F.R. 1150.31. If the Notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

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